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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 154.

QUINCY A. SHAW, PLAINTIFF IN ERROR,

vs.

MURRAY M. KELLOGG.

ON CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

CERTIFICATE FILED APRIL 11, 1898.
CERTIORARI AND RETURN FILED JANUARY 8, 1898.

(16,252.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 18, 1898.

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(2.) That the plaintiff is, and ever since the 15th day of March, 1887, has been, the owner of certain premises situated in Saguache county, in the State of Colorado, known as Baca Grant No. 4, described as follows: Beginning at a point on the eastern edge of the San Luis valley, where the thirty-eighth degree of latitude crosses the dividing line of the plain and mountain; thence east, along the said parallel of latitude, four and one-half miles; thence south, at a right angle to said parallel of latitude, twelve and one-half miles; thence west, at a right angle, twelve and one-half miles; thence north, at a right angle, twelve and one-half miles, to the aforesaid parallel of latitude; thence east, with said parallel
2 of latitude, eight miles, to the place of beginning, containing 99,289.39 acres; and is the owner of the following specifically described premises, situated within the outer boundaries of said Baca Grant No. 4, aforesaid, to wit: Section twenty-two (22) township one (1) north, one (1) east, according to the plat of said Baca Grant No. 4, as filed and recorded in the office of the county clerk and recorder of said Saguache county, and including in said section twenty-two, certain mineral-bearing *bearing* property designated by the defendant as the Eastern Star mine, with other mining lands adjacent thereto within said section twenty-two.

(3.) That the plaintiff's title to the premises hereinabove described is that of an estate in fee-simple.

(4.) That the plaintiff has been, ever since the said 15th day of March, 1887, and now is, entitled to the possession of the said premises hereinabove described, and every part thereof.

(5.) That heretofore and on or about the 15" day of March, 1890, while the plaintiff was in the possession of the said premises, and entitled to the possession thereof, the defendant wrongfully and unlawfully entered into and upon the said premises, last hereinabove described, to wit, section twenty-two, township one north, one east, within the boundaries of the said Baca Grant No. 4, and did oust the plaintiff therefrom, and the said defendant has since wrongfully and unlawfully withheld, and still doth wrongfully and unlawfully withhold, possession thereof from the plaintiff, to the plaintiff's damage in the sum of five thousand dollars.

(6.) And plaintiff alleges that the matter in dispute in this cause arises under the laws of the United States, in this, to wit: that the plaintiff's title is based upon an act of Congress, approved June 21st, 1860, entitled "An act to confirm certain private land claims in the Territory of New Mexico," by which act the heirs of Luis Maria Baca, plaintiff's remote grantors, were authorized to select a certain quantity of "vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number," under and by virtue of which said act, and within three years after the passage thereof, plaintiff's remote grantors, the heirs of said Luis Maria Baca, did select and locate the lands hereinabove described as Baca Grant No. 4, including the premises now in controversy between the plaintiff and defendant, all of which said lands, included within said Baca Grant No. 4, were at the time of the passage of said act, within the then boundaries of the Terri

tory of New Mexico, and the location of the same was ap-
3 proved by the proper officers of the Land Department of the United States, and said land was, by the surveyor general of the State (then Territory) of Colorado, thereunto duly authorized, certified to be non-mineral land; and the plaintiff claims that, by virtue of said statute, and the finding of said surveyor general as to the non-mineral character of said land, at the time of its selection and location, the title to all of said premises passed to the heirs of Luis Maria Baca, and through them, by divers conveyances, to this plaintiff, notwithstanding the fact of subsequent discoveries of precious metals within the boundaries of the said Baca Grant No. 4, hereinabove described.

The defendant, on the other hand, claims and asserts, that, under the proper construction of said act of Congress of June 21st, 1860, hereinabove referred to, and notwithstanding the finding of the surveyor general of the State (then Territory) of Colorado, as to the non-mineral character of said lands, at the time of the selection and location thereof, as said Baca Grant No. 4, the subsequent discovery of precious metals, to wit, silver and gold, upon that portion of the said grant by the said defendant so taken possession of and occupied, excludes from said grant the premises by him so taken possession of, and that this plaintiff has no right thereto.

Wherefore, plaintiff prays judgment:

(1.) For the recovery of the possession of those certain premises situate within the boundaries of said Baca Grant No. 4, and designated on the plat thereof as section twenty-two, township one north, one east, including all those premises within the boundaries of said Baca Grant No. 4, designated by the defendant as the Eastern Star mine, with adjacent mining property held by the said defendant within the boundaries of said section twenty-two.

(2.) For five thousand dollars damages, as aforesaid.

(3.) For all costs of this suit.

WOLCOTT & VAILE,
Attorneys for Plaintiff.

STATE OF COLORADO, }
County of Arapahoe, } ss:

George H. Adams, being first duly sworn, deposes and says:

That he is the agent and attorney-in-fact for the plaintiff, Quincy A. Shaw, within named, and makes this verification by reason
4 of the absence of the said Quincy A. Shaw from the State and district of Colorado; that affiant has read the foregoing complaint, and knows the contents thereof; that the same is true, of his own knowledge, except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

GEORGE H. ADAMS.

Subscribed and sworn to before me, this 24th day of June, A. D. 1893.

[SEAL.] A. J. TRUSSELL,
Notary Public.

My commission expires Dec. 8th, 1896.

(Indorsed:) 2978. United States circuit court, district of Colorado. Quincy A. Shaw, plaintiff, *vs.* Murry M. Kellogg, defendant. Complaint. Filed July 3, 1893. Robert Bailey, clerk. Wolcott & Vaile, att'ys for plaintiff.

And the said summons and proof of service *is* in words and figures as follows, to wit:

Summons.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

Complaint filed in the clerk's office this 3d day of July, A. D. 1893.

QUINCY A. SHAW, Plaintiff,
versus
MURRY M. KELLOGG, Defendant.

The President of the United States of America to the above-named defendant, Greeting:

You, and each of you, are hereby notified that an action has been brought in said court, by Quincy A. Shaw, plaintiff, against you as defendant to recover the possession of those certain premises situated within the boundaries of the Baca Grant No. 4, and designated on the plat thereof as section twenty-two, township one north, one east, including all those premises within the boundaries of said Baca Grant No. 4, designated by the defendant as the Eastern Star mine, with adjacent mining property, for $5,000 damages and for the costs of this suit, as more particularly set forth and described in the complaint filed herein and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service, and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this 3d day of July, A. D. 1893, and of the Independence of the United States the 117th year.

ROBERT BAILEY, *Clerk.*

Proof of Service.

UNITED STATES OF AMERICA, }
District of Colorado, } ss:

DENVER, *July* 6, *A. D.* 1893.

I hereby certify, that I received the within writ on the 4th day of July, A. D. 1893, and that I have personally served the same upon the said defendant Murry M. Kellogg by delivering to Murry M. Kellogg personally, a true copy of the within writ, and a copy of the complaint at the time and place as follows: At Moffat, county of Saguache, on the 5th day of July, A. D. 1895.

This writ therefore returned executed as the law directs, this 6th day of July, A. D. 1893.

A. H. JONES, *Marshal,*
By R. B. WARWICK,
Deputy Marshal.

Marshal's Fees.

2 service- 1 defendants, at $2	$4.00
Mileage 265 miles at 6c. going only	15.90
Expenses	2.75
	$19.90
Total	22 65

(Indorsed:) No. 2978. Circuit court of the United States for the district of Colorado. Quincy A. Shaw, plaintiff, *versus* Murry
6 M. Kellogg, defendant. Summons. Filed this 6th day of July, A. D. 1893. Robert Bailey, clerk. Wolcott & Vaile, of Denver, attorneys for plaintiff.

UNITED STATES OF AMERICA, }
District of Colorado, } ss:

Demurrer.

In the Circuit Court.

QUINCY A. SHAW, Plaintiff, }
vs.
MURRY M. KELLOGG, Defendant. }

Now comes the said defendant and demurs to the complaint of the plaintiff herein and for cause thereof says:

First. That the complaint does not state facts sufficient to constitute a cause of action.

Second. That the said complaint is ambiguous and uncertain in this:

1st. That it alleges that the plaintiff has title in fee to the premises in controversy.

2nd. That it alleges that the title is still in the United States and

that he has received no patent for it, but that he derives his title from the Bacca Grant No. 4, without alleging that said grant as claimed by the plaintiff and located by the surveyor has ever been approved by Congress or the Land Department of the Government, and without alleging that the premises in controversy was non-mineral land at the time of the location of the grant or at the present time.

3rd. That the complaint does not allege that the plaintiff or his grantor has ever received a patent from the Government.

4th. That the complaint does not allege that the plaintiff or his grantor in the location of the Bacca Grant No. 4 has complied with the law of Congress authorizing said location, either in general terms or by specifically setting out the acts done by him or his grantor or by the surveyor in the location of said grant, and that said complaint is a suit brought in terms for a mining claim and does admit that the part of the grant sought to be recovered from the defendant is mineral land.

Third. Said complaint is uncertain in this: That it does not show the time of the alleged entry by defendant upon the said premises.

JOHN W. BLACKBURN,
JOHN R. SMITH,
Attorneys for said Defendant.

7 (Indorsed:) No. 2978. In the circuit court, district of Colorado. Quincy A. Shaw, plaintiff, *vs.* Murray M. Kellogg, defendant. Demurrer to complaint. Filed Aug. 3, 1893. Robert Bailey, clerk U. S. circuit court. John W. Blackburn, John R. Smith, attorneys for defendant.

44th day.

FRIDAY, *January 5th, A. D.* 1894.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the 7th day of November last past.

Action for possession of specific real property and for damages.

QUINCY A. SHAW
vs.
MURRY M. KELLOGG. } 2978.

At this day comes the said plaintiff by J. F. Vaile, Esq., his attorney, and the said defendant in his own proper person also comes.

And the demurrer to the complaint coming on now to be heard is argued by counsel and the court being now sufficiently advised in the premises it seemeth to the court now here that the said complaint is sufficient in law, and so the said demurrer is overruled.

And thereupon it is ordered by the court that the said defendant answer herein within thirty (30) days from this day.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Answer and Cross-complaint.

In the Circuit Court.

QUINCY A. SHAW, Plaintiff, }
vs.
MURRAY M. KELLOGG, Defendant. }

The defendant Murray M. Kellogg, for answer to plaintiff's complaint herein, denies:

That the plaintiff is, or ever since the 15th day of March, 1887, or at any other time has been the owner of certain premises situated in Saguache county, in the State of Colorado, known as Baca Grant No. 4, as described in said complaint, denies that plaintiff is the owner of the following specifically described premises, or any
8 part thereof, situated within the outer boundaries of said Baca Grant No. 4, to wit: section 22, township 1 north, 1 east according to the plat of said Baca Grant No. 4, as filed and recorded; denies that plaintiff is the owner of a certain mineral-bearing property designated by the defendant as the Eastern Star mine, or any part thereof, or other mining lands adjacent thereto, within said section 22.

Defendant states affirmatively that whatever pretended title plaintiff may have to any part of said Baca Grant No. 4 is in fact a mortgage to secure the payment of a certain sum of money from the real owner or owners of said property.

Defendant denies that plaintiff's title to the premises hereinbefore described is that of an estate in fee-simple, or any other title whatever.

Defendant denies that plaintiff has been, ever since the 15th day of March, 1887, or at any other time, or now is, entitled to the possession of the premises above described, or any part thereof.

Defendant denies that on or about the 15th day of March, 1890, or at any other time, while the plaintiff was in the possession of the said premises, or entitled to the possession thereof, that the defendant wrongfully or otherwise, or unlawfully entered into or upon the said premises above described, to wit: section 22, township 1 north, 1 east, within the boundaries of said Baca Grant No. 4; denies that defendant did oust the plaintiff therefrom, or any part thereof; denies that the defendant wrongfully or unlawfully withholds the possession from plaintiff, to plaintiff's damage in the sum of five thousand dollars or any sum whatever.

Defendant denies that the heirs of Louis Marie Baca, or any other persons, under the laws of the United States, within three years from June 21st, 1860, did locate or select the lands above described as Baca Grant No. 4, including the premises now in controversy between plaintiff and defendant or any part thereof; and alleges that the east and north lines of said alleged grant were not con-

nected on the ground or the northeast corner of said survey set or determined, or the said survey, or the lines thereof closed.

Defendant denies that the location of the lands in controversy, or any part thereof, was approved by the proper officers of the Land Department of the United States; denies that the surveyor general of Colorado was authorized to, or did, certify that the lands in controversy or any part thereof *was* non-mineral land; and alleges the fact to be that said lands, at the time of alleged location, were, and were known to be, mineral lands.

9 Wherefore defendant demands that plaintiff's action be dismissed, and that defendant have judgment for costs herein.

Second count.

Defendant, for a further and affirmative answer to plaintiff's complaint herein alleges:

That for more than ten years continuously, next prior to the commencement of this action, defendant and his grantors have been in the actual, exclusive, open and notorious possession of said Eastern Star mine, described in plaintiff's complaint, under color of title and claim of right, against the claims of the whole world, and particularly the plaintiff and his grantors, and that during all of said years no taxes could lawfully be assessed against said premises, and none were so assessed.

Wherefore defendant prays that he have judgment:

First. That he is the owner of and entitled to the possession of the premises above described, with the appurtenances.

Second. For such other and further relief as to equity seems just and for costs of suit herein.

Third count.

Defendant states as a third count and further cause of action against the plaintiff, and as a cross complaint herein:

That on the 24th day of April, 1876, the land where the Eastern Star mine is located was unappropriated public mineral land of the United States, and as such, subject to exploration, and location; that on that day Francois Herard, Ulysses Herard, and Howard O. Horne, citizens of the United States, went upon said ground and discovered the Eastern Star vein, bearing gold and silver; that after said vein had been opened by a tunnel for thirty feet, showing a well-defined vein of quartz, bearing gold and silver in rock in place, said parties properly surveyed the surface of said claim, and marked the boundaries thereof by placing a location notice at point of discovery and setting a substantial stake at each corner, and the center of each side line properly marked so that the boundaries of said claim could be readily traced and found upon the ground, and afterwards, to wit: on the 17th day of June, 1876, filed for record in the office of the county recorder of Saguache county, Colorado, a location certificate of said mine, in words and figures following, to wit:

"TERRITORY OF COLORADO, } ss:
County of Saguache, }

Know all men by these presents, that the undersigned have this 24th day of April, 1876, claimed by right of discovery and location fifteen hundred feet linear and horizontal measurement in length and three hundred feet in width on the Eastern Star lode, along the vein thereof, with all its spurs, dips, variations and angles, and one hundred and fifty feet in width on each side of said lode, together with all other lodes, veins and ledges, the top or apex of which lies within the surface boundary lines of said mining claim, and together with all surface grounds allowed by law, three hundred feet of said lode so located, lying and being N. 55 degrees W. of the discovery stake on said lode, and 1,200 feet being S. 55 degrees east of said stake, said lode and mining claim being situated in the Eldorado mining district in the county of Saguache and Territory of Colorado, the location and bounds of said mining claim being marked and described more particularly as follows, to wit: Said lode being located on Gold hill, commencing about fifty feet south of the Cottonwood creek Sangre de Christo, said discovery tunnel is drove on the center of the crevice of said vein, lode or ledge thirty feet deep from the lowest part of the vein thereof at the surface, and the boundaries of said mining claim are duly marked as required by law with six substantial posts, one at each corner, and one at the center of each side boundary line of said mining claim. Said lode and mining claim was discovered, staked, located, and due and legal notice thereof posted at the point of discovery on the 24th day of April, 1876, and with the interests in said location agreed upon and fixed as follows: Each claiming a one-third interest, Francois Herard, Ulysses Herard, and Howard O. Horne, and we having complied with all the requirements of law, and the mining rules and regulations, do hereby execute this certificate of location this 16th day of June, 1876."

Said location certificate was duly recorded in Book 4, page 140, of the county records of Saguache county, Colorado. That at least one hundred dollars' worth of labor or improvements were made or performed on said mine each and every year from that time by said locators or their successors in interest, to the present time.

That the defendant is the owner of said mining claim under said location, except as against the United States, and entitled to the undisturbed possession thereof.

Wherefore defendant prays for judgment, that the defendant is the owner of said Eastern Star mining claim, with the appurtenances thereto belonging, and entitled to the undisturbed possession thereof.

And for such other and further relief as to equity is just.

JOHN R. SMITH,
Attorney for Defendant.

nected on the ground or the northeast corner of said survey set or determined, or the said survey, or the lines thereof closed.

Defendant denies that the location of the lands in controversy, or any part thereof, was approved by the proper officers of the Land Department of the United States; denies that the surveyor general of Colorado was authorized to, or did, certify that the lands in controversy or any part thereof *was* non-mineral land; and alleges the fact to be that said lands, at the time of alleged location, were, and were known to be, mineral lands.

9 Wherefore defendant demands that plaintiff's action be dismissed, and that defendant have judgment for costs herein.

Second count.

Defendant, for a further and affirmative answer to plaintiff's complaint herein alleges:

That for more than ten years continuously, next prior to the commencement of this action, defendant and his grantors have been in the actual, exclusive, open and notorious possession of said Eastern Star mine, described in plaintiff's complaint, under color of title and claim of right, against the claims of the whole world, and particularly the plaintiff and his grantors, and that during all of said years no taxes could lawfully be assessed against said premises, and none were so assessed.

Wherefore defendant prays that he have judgment:

First. That he is the owner of and entitled to the possession of the premises above described, with the appurtenances.

Second. For such other and further relief as to equity seems just and for costs of suit herein.

Third count.

Defendant states as a third count and further cause of action against the plaintiff, and as a cross complaint herein:

That on the 24th day of April, 1876, the land where the Eastern Star mine is located was unappropriated public mineral land of the United States, and as such, subject to exploration, and location; that on that day Francois Herard, Ulysses Herard, and Howard O. Horne, citizens of the United States, went upon said ground and discovered the Eastern Star vein, bearing gold and silver; that after said vein had been opened by a tunnel for thirty feet, showing a well-defined vein of quartz, bearing gold and silver in rock in place, said parties properly surveyed the surface of said claim, and marked the boundaries thereof by placing a location notice at point of discovery and setting a substantial stake at each corner, and the center of each side line properly marked so that the boundaries of said claim could be readily traced and found upon the ground, and afterwards, to wit: on the 17th day of June, 1876, filed for record in the office of the county recorder of Saguache county, Colorado, a location certificate of said mine, in words and figures following, to wit:

"TERRITORY OF COLORADO, } ss:
County of Saguache, }

Know all men by these presents, that the undersigned have this 24th day of April, 1876, claimed by right of discovery and location fifteen hundred feet linear and horizontal measurement in length and three hundred feet in width on the Eastern Star lode, along the vein thereof, with all its spurs, dips, variations and angles, and one hundred and fifty feet in width on each side of said lode, together with all other lodes, veins and ledges, the top or apex of which lies within the surface boundary lines of said mining claim, and together with all surface grounds allowed by law, three hundred feet of said lode so located, lying and being N. 55 degrees W. of the discovery stake on said lode, and 1,200 feet being S. 55 degrees east of said stake, said lode and mining claim being situated in the Eldorado mining district in the county of Saguache and Territory of Colorado, the location and bounds of said mining claim being marked and described more particularly as follows, to wit: Said lode being located on Gold hill, commencing about fifty feet south of the Cottonwood creek Sangre de Christo, said discovery tunnel is drove on the center of the crevice of said vein, lode or ledge thirty feet deep from the lowest part of the vein thereof at the surface, and the boundaries of said mining claim are duly marked as required by law with six substantial posts, one at each corner, and one at the center of each side boundary line of said mining claim. Said lode and mining claim was discovered, staked, located, and due and legal notice thereof posted at the point of discovery on the 24th day of April, 1876, and with the interests in said location agreed upon and fixed as follows: Each claiming a one-third interest, Francois Herard, Ulysses Herard, and Howard O. Horne, and we having complied with all the requirements of law, and the mining rules and regulations, do hereby execute this certificate of location this 16th day of June, 1876."

Said location certificate was duly recorded in Book 4, page 140, of the county records of Saguache county, Colorado. That at least one hundred dollars' worth of labor or improvements were made or performed on said mine each and every year from that time by said locators or their successors in interest, to the present time.

That the defendant is the owner of said mining claim under said location, except as against the United States, and entitled to the undisturbed possession thereof.

Wherefore defendant prays for judgment, that the defendant is the owner of said Eastern Star mining claim, with the appurtenances thereto belonging, and entitled to the undisturbed possession thereof.

And for such other and further relief as to equity is just.

JOHN R. SMITH,
Attorney for Defendant.

TERRITORY OF UTAH, } ss:
County of Utah, }

M. M. Kellogg, being duly sworn, on oath states: I am defendant herein, and the statements contained in the foregoing answer and cross-complaint are true, of my own knowledge, except those matters stated on information and belief, as to those matters, I believe it to be true.

M. M. KELLOGG.

Subscribed and sworn to before me this 10 day of March, 1894.

[SEAL.] ELMER E. CORFMAN,
Notary Public.

My commission expires Oct. 5", 1894.

(Indorsed:) No. 2978. In the circuit court of the United States. Quincy A. Shaw, plaintiff, *vs.* Murray M. Kellogg, defendant. Answer and cross-complaint. Filed Mar. 12, 1894. Robert Bailey, clerk U. S. circuit court. Murray M. Kellogg, *pro se.* John R. Smith, attorney for defendant.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Demurrer.

In the Circuit Court.

QUINCY A. SHAW, Plaintiff,
vs.
MURRAY M. KELLOGG, Defendant.

Comes now the plaintiff in the above entitled action and demurs to the second count of the defendant's answer to the complaint herein, designated as a further and affirmative answer to plaintiff's complaint, on the ground that said answer does not state facts sufficient to constitute a defense to plaintiff's cause of action.

WOLCOTT & VAILE,
Att'ys for Pl'ff.

(Indorsed:) 2978. United States circuit court, district of Colorado. Quincy A. Shaw, plaintiff, *vs.* Murray M. Kellogg,
12 defendant. Demurrer to 2d count of def't's ans. Filed May 17, 1894. Robert Bailey, clerk U. S. circuit court. Wolcott & Vaile, attorneys for plaintiff.

19th day, May term.

FRIDAY, *May 25th, A. D.* 1894.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the first instant.

Action for possession of specific real property and for damages.

QUINCY A. SHAW
vs.
MURRAY M. KELLOGG. } 2987.

At this day comes the said plaintiff, by J. F. Vaile, Esq., his attorney and the said defendant by J. R. Smith, Esq., his attorney also comes.

And the demurrer to the second count of the answer, and the motion to strike out part of the said answer, coming on now to be heard, is argued by counsel, and the court being now sufficiently advised in the premises, it seemeth to the court now here, that said second count of the said answer is not sufficient in law and so the said demurrer is sustained, and it is ordered, for good and sufficient reasons to the court appearing that the motion to strike out part of the answer be and is hereby denied.

And thereupon on motion of the said defendant, it is ordered by the court, that he have leave to file an additional answer within five (5) days from this day.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

Additional Answer.

In the Circuit Court.

QUINCY A. SHAW, Plaintiff,
vs.
MURRAY M. KELLOGG, Defendant.

The defendant, Murray M. Kellogg, by leave of court first had, files this his additional answer to the plaintiff's complaint herein and for an affirmative defense thereto, alleges:

I.

That whatever title or pretended title the plaintiff may have to all or any part of said Baca Grant Number 4 is, in truth and fact, a mortgage to secure the payment of certain moneys due
13 from the real owner or owners of said property to the said plaintiff.

II.

Defendant alleges that the location, selection and survey of the lands described in the said complaint as being within and constituting Baca Grant Number 4, and including the premises now in controversy between the plaintiff and defendant, were not made located

or surveyed within three (3) years from and after June 21st, 1860, and that the survey of said Baca Grant Number 4, by the surveyor general of the United States, was not completed within the said three years, nor for many years thereafter and not, as defendant is informed and believes, until the summer of the year 1892. And defendant alleges that until the year 1892, the easterly one-fifth of the north exterior line of said alleged grant and the northerly two-thirds ($\frac{2}{3}$) of the east exterior line of said alleged grant were never in fact surveyed, ran or extended upon the grounds by an actual survey thereof, nor were the said lines connected upon the ground or the northeast corner of said survey set or determined, or the said survey or the lines thereof closed, or the said survey completed and finally approved by the officers of the Land Department of the United States; and that during all of said period and until the year 1892, it was wholly impossible and impracticable to ascertain or determine, from said survey, whether or not the lands and premises now in controversy between the plaintiff and defendant were within the exterior lines of said alleged grant, as surveyed and located.

And defendant alleges that at the time of the location by the grantors of this defendant of the Eastern Star mine, as in the answer herein more specifically described, and on, to wit, the 17th day of June, 1876, the said lands and premises had not been surveyed, as required in and by the act of Congress of June 21st, 1860; and that the failure to survey the said lands and premises, or to have them surveyed by the proper officers, was caused wholly by the negligence and inattention thereto of the plaintiff and his grantors.

III.

Defendant alleges that at the time of the alleged location and selection of said lands by the heirs of Louis Maria Baca, or their assigns, that portion of said grant now in controversy between this plaintiff and defendant was mineral land, valuable for gold, silver and other metals and valuable for nothing else, and was known to be mineral land; and on information and belief, defendant
14 alleges, was known to the locators of said lands to be mineral land, at the time of such pretended location.

Wherefore, defendant prays that the plaintiff's action be dismissed and that he have judgment for his costs herein.

JOHN R. SMITH,
Attorney for Defendant.

TERRITORY OF UTAH, }
County of Utah. }

M. M. Kellogg, being duly sworn, on oath says that he is the defendant herein and has read the foregoing additional answer; and that the matters therein stated are true of his own knowledge, except as to those stated on information and belief and as to those he believes it to be true.

M. M. KELLOGG.

Subscribed and sworn to before me this 31" day of May, 1894.
My commission expires Oct. 25", 1894.
[SEAL.] ELMER E. CORFMAN,
Notary Public.

(Indorsed:) No. 2978. In the U. S. circuit court, district of Colorado. Quincy A. Shaw *vs.* Murry M. Kellogg. Additional answer to complaint. Filed Jun- 4, 1894. Robert Bailey, clerk U. S. circuit court. John R. Smith, attorney for defendant.

UNITED STATES OF AMERICA, } *ss.*:
District of Colorado, }

Demurrer.

In the Circuit Court.

QUINCY A. SHAW, Plaintiff, }
vs. }
MURRAY M. KELLOGG, Defendant. }

I.

The plaintiff above named demurs to paragraph numbered I in the additional answer filed by the defendant in the above-entitled cause, and for ground of demurrer says, that said paragraph numbered I does not state facts sufficient to constitute, or tending to constitute, a defence to the plaintiff's complaint.

II.

Plaintiff demurs to paragraph numbered II in the additional answer of the defendant filed in the above-entitled cause, and for ground of demurrer says, that said paragraph numbered II does not state facts sufficient to constitute, or tending to constitute, a defence to the plaintiff's complaint.

WOLCOTT & VAILE,
Plaintiff's Attorneys.

(Indorsed:) 2978. United States circuit court, district of Colorado. Quincy A. Shaw, plaintiff, *vs.* Murray M. Kellogg, defendant. Demurrer to answer & add'l answer of def't. Filed Nov. 20, 1894. Robert Bailey, clerk U. S. circuit court. Wolcott & Vaile, att'ys for plaintiff.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Reply.

In the Circuit Court.

QUINCY A. SHAW, Plaintiff, }
vs.
MURRAY M. KELLOGG, Defendant. }

I.

The plaintiff, for reply to the third count of the defendant's original answer in the above-entitled cause, denies that, on the 24th day of April, 1876, or at any time subsequent thereto, or that for more than ten years prior thereto, the land where the Eastern Star mine is located was unappropriated, public, mineral land of the United States, or that, as such, the same was subject to exploration or location; that, whether or not on that day, to wit, April 24th, 1876, or at any other time, Francois Herard, Ulysses Herard and Howard O. Horne were citizens of the United States, or either of them was a citizen of the United States, or whether they or either of them went upon said ground and discovered the Eastern Star mine, bearing gold or silver, or whether afterwards any vein therein had been opened by a tunnel for thirty or any other number of feet, or whether the same was a well-defined vein of quartz, bearing gold or silver in rock in place; or whether said parties or either of them, properly or at all, surveyed the surface of said claim, or marked the boundaries thereof by placing location notice at point of discovery, or setting a substantial stake at each corner or at the center of each side line, properly marked, or otherwise, so that the boundaries of said claim could be readily traced or fixed upon the ground, or in any other manner located or marked said claim, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

That, whether or not one hundred dollars' worth of labor or improvements were performed or made on said mine, each
16 or any year from the time of the alleged location thereof, by the said locators, or their successors in interest, or by any one in their behalf, to the present time, or at all, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Plaintiff denies that the said defendant is the owner of said alleged mining claim under said location, or that the said defendant has any interest whatsoever therein, and denies that the said defendant is entitled to the undisturbed possession thereof, or any possession thereof whatsoever.

II.

For reply to the third paragraph of the defendant's additional answer, filed in this cause, the plaintiff denies that, at the time of

the alleged location and selection of said lands by the heirs of Luis Maria Baca, or their assigns, that portion of said ground now in controversy between plaintiff and defendant, was known to be mineral land, and denies that said lands were at that time, or at any time, valuable for nothing else than the gold, silver or other metals contained therein, and plaintiff denies that the said land was known to the locators thereof to be mineral land at the time of said location, that whether said lands are now more valuable for the minerals therein contained than for other uses or qualities this plaintiff has not and cannot obtain sufficient knowledge or information on which to base a belief.

Wherefore plaintiff asks judgment as in the original complaint demanded.

WOLCOTT & VAILE,
Plaintiff's Attorneys.

STATE OF COLORADO, } ss:
County of Arapahoe, }

Joel F. Vaile, being duly sworn deposes and says: That he is the attorney for the plaintiff, Quincy A. Shaw, above named, and makes this affidavit by reason of the absence of the said Quincy A. Shaw, plaintiff, from the State of Colorado; that deponent has read the foregoing reply, and knows the contents thereof, and that the matters therein stated are true to the best knowledge, information and belief of this affiant.

JOEL F. VAILE.

Subscribed and sworn to before me, this 20th day of November, 1894.

[SEAL.] A. J. TRUSSELL,
Notary Public.

My commission expires Dec. 8th, 1896.

17 (Indorsed:) 2978. United States circuit court, district of Colorado. Quincy A. Shaw, plaintiff, *vs.* Murray M. Kellogg, defendant. Reply to answer and add'l answer. Filed Nov. 20, 1894. Robert Bailey, clerk U. S. circuit court. Wolcott & Vaile, att'ys for plaintiff.

22d day, November term.

SATURDAY, *December 1st, A. D.* 1894.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the 6th day of November last past.

Action for possession of specific real property and for damages.

QUINCY A. SHAW
vs. } 2978.
MURRY M. KELLOGG.

The demurrer of the plaintiff to the first and second additional answers of the defendant filed herein having heretofore come on to

be heard and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it seemeth to the court now here, that the matters and things alleged in the first additional answer are not sufficient in law to be replied unto, and that the matters and things alleged in the second said additional answer are sufficient in law to be replied unto.

Wherefore it is ordered by the court that the demurrer to the first additional answer herein, be and the same is hereby sustained.

And it is further ordered by the court that the demurrer to the second additional answer, be and the same is hereby overruled.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Additional Replication.

In the Circuit Court.

QUINCY A. SHAW, Plaintiff }
vs. }
MURRAY M. KELLOGG, Defendant. }

Comes now the plaintiff above named, and makes replication to the additional answer filed by the defendant in the above-entitled cause.

18 I.

For first replication to the second paragraph of said additional answer, the plaintiff denies that the selection of the lands described in the complaint as being within and constituting Baca Grant No. 4, was not made within three years from and after June 21st, 1860; and plaintiff denies that the location of said lands was not made within three years from and after June 21st, 1860.

And plaintiff says that it is not true that there was no survey made of said premises prior to the year 1892, or no final approval of such survey by the officers of the Land Department of the United States within said period, but, on the contrary, plaintiff alleges that said premises were surveyed in the year 1863, and that the survey thereof was duly approved by John Pierce, then surveyor general of the Territories of Colorado and Utah, on the 15th day of March, 1864.

Plaintiff denies that during all or any of the period mentioned in the said answer, subsequent to February 5th, 1863, or that until the year 1892, it was wholly or at all impossible or impracticable to ascertain or determine whether or not the lands and premises now in controversy between the plaintiff and defendant, were within the exterior lines of said grant as surveyed and located. And plaintiff denies that, at the time of the location by the grantors of the defendant, of the Eastern Star mine, or on, to wit, the 17th day of June, 1876, the said lands and premises had not been surveyed; and denies that any failure to survey the said lands and premises,

or to have them surveyed by the proper officers, was caused wholly or at all by any negligence or inattention on the part of the plaintiff or his grantors.

II.

Further replying to said second paragraph of the additional answer in the above-entitled cause, the plaintiff alleges, that the heirs of Luis Maria Baca were grantees of the United States, as to certain lands, under and pursuant to section 6 of an act of Congress entitled "An act to confirm certain private land claims in the Territory of New Mexico," approved June 21st, 1860; and had authority under said act to select vacant lands in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number, equal in amount to a certain tract of land theretofore claimed by the heirs of said Luis Maria Baca, at and in the vicinity of the town of Las Vegas, in the Territory of New Mexico; which right so to select such vacant lands was continued in force for three years from the said 21st day of June, 1860; and that, in and by
19 said act of Congress hereinabove mentioned, it was made the duty of the surveyor general of New Mexico to make a survey and location of the lands so selected by the said heirs of Baca when thereunto required by them.

And plaintiff alleges that, within said period of three years, and to wit, on the 5th day of February, 1863, the heirs of Luis Maria Baca, by one John S. Watts, as their attorney, duly filed in the office of the surveyor general of the Territory of New Mexico, an application for the survey and location of the following-described tract of land, to wit:

"Beginning at a point on the eastern edge of the valley of San Luis, where the 38th parallel of north latitude crosses the base of the snowy range, dividing the waters of the Rivers Arkansas and Del Norte; thence east, along said parallel, four and one-half miles; thence south, along a meridian line, twelve miles, thirty-six chains and forty-four links' distance; thence west at a right angle, twelve miles, thirty-six chains and forty-four links' distance; thence north to the specified parallel of latitude; thence east, with said parallel, to the place of beginning;"

which said application bore date of December 12th, 1862.

That on said 5th day of February, 1863, John A. Clark, then surveyor general of the Territory of New Mexico, duly executed his certificate to the effect that said application had been filed; that the tract of land therein designated was the one-fifth part of the claim confirmed to said heirs; that it contained 99,289 acres and $\frac{39}{100}$ of an acre, and that

"this location is the fourth of the series, and with the three locations heretofore made, numbered 1, 2 and 3, includes four-fifths of the said private claim confirmed to the heirs of the said Luis Maria Cabeza de Baca by the act of Congress approved June 21st, 1860."

And plaintiff alleges that, prior to the selection and location of

said lands as hereinabove mentioned, the Commissioner of the General Land Office of the United States, by written instructions to the surveyor general of New Mexico, transmitted on July 26th, 1860, directed the said surveyor general as follows:

"Should the Baca claimants select outside of the existing surveys, they must give such distinct description and connection with natural objects in their applications to be filed in your office, as will enable the deputy surveyor, when he may reach the vicinity of such selections in the regular progress of the surveys, to have the selections adjusted, as near as may be, to the lines of the public surveys, which may hereafter be established in the region of those selections."

That afterwards, and by an official communication to the surveyor general of Colorado, the said the honorable Commissioner of the General Land Office, advised the said surveyor general that, by the instructions hereinabove mentioned,

"it was plainly indicated that, should selections be made outside of the existing surveys, the survey thereof must be postponed until the vicinity is reached by the regular process of the public surveys."

And plaintiff alleges that, at the time of the selection of the lands constituting said Baca Grant No. 4, the same were outside of the existing surveys; that in the application for the same by the heirs of Luis Maria Baca, as aforesaid, there was given such distinct description and connection with natural objects as to enable the deputy surveyor to adjust the same, according to the instructions hereinabove quoted.

Plaintiff further alleges that, subsequent to the selection of said lands as aforesaid, and pursuant to the application hereinabove recited, a survey of said lands was made under the authority of the surveyor general of Colorado and Utah, as successor in authority to the surveyor general of the Territory of New Mexico, which said survey was commenced on October 22nd, 1863, and was completed on November 4th, 1863, and was by John Pierce, then surveyor general of the Territories of Colorado and Utah, duly approved on the 15th day of March, 1864; that the survey so made and approved shows the ascertainment and location of the initial point described in said application as hereinabove set forth; that the said survey was carried from said initial point eastwardly upon the 38th parallel of latitude, for the distance of two miles, when the further progress of the survey in that direction was interrupted by the following facts as stated by the surveyor:

"The mountain in front of us is utterly impracticable. In our immediate presence is a precipitous wall of granite, and from this point to its crest is a succession of such, only higher and more difficult. I see no way of surmounting the difficulty by offsets or otherwise."

That thereupon the said survey was resumed from the initial point above mentioned, westwardly, along the 38th parallel of north latitude, for a distance of eight miles, to the northwest corner of said location; thence, said survey was continued on a meridian line

southerly a distance of twelve miles, thirty-six chains and forty-four links, to the southwest corner of said location. That said survey was thence continued easterly, upon a line parallel with the
21 38th parallel of north latitude, for a distance of twelve miles, thirty-six chains and forty-four links, to the southeast corner of said location; that thence said survey was continued northerly, upon the east boundary line of said location, for a distance of four miles, seven chains and twelve links, to a point on the east boundary, at which said surveyor set a monument marked "No. 13," and at which point the surveyor making said survey reported as follows:

"From this point to the northeast corner of the grant, the mountains are very rugged, precipitous and deeply covered with snow. The line, if at all, could be carried through only with great difficulty, and with a result with respect to accuracy which could serve but little to any practical purpose."

That, in the survey so made, each of the several corners, to wit, the northwest corner, the southwest corner and the southeast corner of said location, were distinctly marked by monuments, and in the notes of survey were designated by references to natural monuments.

And plaintiff further alleges that the lands claimed by the defendant, and which are involved in the controversy in this action, are situated far within the interior of said location, as hereinabove described, and that the location of the lands claimed by the defendant as aforesaid *are* at a point about four miles south and one and one-half miles east from the initial point of the survey hereinabove mentioned, which said initial point is about four and one-half miles westerly from the northeast corner of said grant.

Plaintiff further alleges that the survey made in the year 1892, referred to in the defendant's said answer herein, was not a location survey for the said grant; that the same was a survey of the north and east boundaries of said Baca Grant No. 4; was based upon the survey of Albinus Z. Sheldon, being the survey hereinbefore described as approved by the surveyor general of the Territory of Colorado, on the 15th day of March, 1864, and that the said survey of 1892 was made for the purpose of designating upon the ground that portion of the north boundary and that portion of the east boundary of said grant not theretofore marked upon the ground, and to so mark and locate the northeast corner of said grant; that said survey did not in any respect whatsoever modify the location of the said Baca Grant No. 4, or the situation of boundaries of the same as designated by the survey of 1863 approved in 1864 as aforesaid; that, in the making of said survey of 1892, which was made under the authority of the Government of the United States, point No. 13 of the survey of 1863, hereinbefore mentioned, was
22 ascertained and identified; that the southeast corner of said grant, as the same was located in accordance with the survey of 1863, was also ascertained and identified, and that the eastern boundary of the said Baca Grant No. 4 was thereupon continued northerly from said point No. 13 by way of completion upon the ground of the boundary lines of said grant as the same was origi-

nally located and as approved in 1864; that, in like manner, in the said survey of 1892, the initial point upon the north boundary, as fixed and determined in the survey of 1863, was found and identified, and from said point said survey was carried easterly along the 38th parallel of latitude, and, as nearly as possible, the said northerly boundary marked and designated by monuments and the northeast corner of said grant established upon the ground. And plaintiff alleges that no change whatsoever was by said survey of 1892 made in any of the corners or lines theretofore established by the said approved survey of 1863. And plaintiff further alleges that the lands claimed by the defendant, and in controversy in this action, are situated about three miles west and four and one-fourth miles north of said point No. 13, on the eastern boundary of the said Baca Grant No. 4.

III.

Plaintiff, for additional and further reply to the allegations contained in the third paragraph of defendant's additional answer, says:

That subsequent to the enactment of the act of June 21st, 1860, confirming to the heirs of Luis Maria Baca certain lands by them thereafter to be selected, and prior to the selection and location of Baca Grant No. 4, described in the complaint, the Commissioner of the General Land Office instructed the surveyor general of the State of Colorado, pursuant to instructions theretofore by him given on or about July 26th, 1860, to the surveyor general of the Territory of New Mexico, as follows:

"The official rendition of the certificate to this office must be accompanied by a statement from yourself and the register and receiver, that the land is vacant and not mineral."

That, after the selection by the heirs of Luis Maria Baca of Baca Grant No. 4, including all of the lands described in plaintiff's complaint, and upon the completion of the survey thereof, John Pierce, surveyor general of the Territories of Colorado and Utah, under date of December 5th, 1863, duly certified that the said Baca Grant No. 4, in the San Luis valley, was upon land which "is not mineral and is vacant."

23 That, at the same time, and under the said date of December 5th, 1863, G. M. Chilcott, register, and C. B. Clements, receiver, of the land office for Colorado Territory, then located at Golden city, in said Territory, also certified that said land upon which said Baca grant was located, "is not mineral and is vacant."

And plaintiff further alleges that, at the time of the selection and location of said lands so constituting Baca Grant No. 4, neither the plaintiff nor his grantors had knowledge that the said lands, or any portion thereof, were mineral lands; that afterwards, and on the 21st day of March, 1879, the Honorable J. A. Williamson, Commissioner of the General Land Office, in an official communication to William L. Campbell, surveyor general of Colorado, in a decision relating to the title to said lands, declared as follows:

"After the selection of this tract, it was surveyed and located by

the surveyor general of Colorado, he having first determined that the land was vacant and non-mineral."

And further decided as follows:

"The conditions and provisions of the act of June 21st, 1860, were * * * that the selection and location should be of land determined at the time of such location when the title passed, to be non-mineral."

The said Commissioner of the General Land Office in said decision, further decided as follows:

"The question as to the mineral or non-mineral character of this land has been passed upon by competent authority. The title has passed from the Government and vested in private individuals. * * * The land can no longer be regarded as a part of the public domain."

Wherefore plaintiff alleges that said land has been determined by competent authority, under the laws of the United States, to be non-mineral land, that said determination is conclusive as to all persons claiming under the United States, and that the defendant cannot now claim that the said land, or any part thereof, is mineral land.

And plaintiff asks judgment as in his original complaint prayed.

WOLCOTT & VAILE,
Att'ys for Plaintiff.

STATE OF COLORADO, }
County of Arapahoe, } ss:

Joel F. Vaile, being first duly sworn, deposes and says: That he is the attorney of the above-named plaintiff, and that he
24 makes this affidavit by reason of the absence of the said plaintiff from the district of Colorado; that he has read the foregoing replication and knows the contents thereof, and that the same is true, except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

JOEL F. VAILE.

Subscribed and sworn to before me, this 8th day of December, A. D. 1894.

[SEAL.] A. J. TRUSSELL,
Notary Public.

My commission expires Dec. 8th, 1896.

(Indorsed:) 2978. In the U. S. circuit court, district of Colorado. Quincy A. Shaw *v.* Murray M. Kellogg. Additional replication. Filed Dec. 8, 1894. Robert Bailey, clerk U. S. circuit court.

79th day, November term.

WEDNESDAY, *March 13th, A. D.* 1895.

Present: Honorable Moses Hallett, district judge, and the Honorable John A. Riner, district judge of the district of Wyoming assigned to the district of Colorado, and other officers as noted on the sixth day of November last past.

And before the Honorable Moses Hallett, district judge, the following proceeding was had:

Action for possession of specific real property and for damages.

QUINCY A. SHAW
vs.
MURRAY M. KELLOGG. } 2978.

At this day comes the plaintiff by J. F. Vaile, Esq., his attorney, and the defendant by J. R. Smith, Esq., his attorney, also comes.

And thereupon comes a jury, to wit:

H. T. Sutherland,	Harrison Montague,
Henry Campbell,	W. H. Morrill,
Frank A. Burnell,	James E. Lightburn,
Charles Davis,	J. T. Jones,
J. N. Pierce,	George B. Berger,
Robert B. Nelson,	Nelson Maine,

twelve good and lawful men; and they are duly selected and tried, empanelled and sworn, to well and truly try the matter at
25 issue herein joined, between the parties to this cause and a true verdict render according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors being now each duly cautioned by the court, not to converse among themselves or with others touching this cause, or the matters at issue herein or the evidence heard, or any part thereof, nor to listen to such conversation of others, are permitted to retire to meet the court at its next incoming.

80th day, November term.

THURSDAY, *March 14th, A. D.* 1895.

Present: Honorable Moses Hallett, district judge, and Honorable John A. Riner, district judge of the district of Wyoming assigned to the district of Colorado and other officers as noted on the sixth day of November last past.

And before the Honorable Moses Hallett, district judge, the following proceeding was had:

Action for possession of specific real property and for damages.

QUINCY A. SHAW
vs.
MURRY M. KELLOGG. } 2978.

At this day come again the said parties by their attorneys respectively and the said jurors being now all here, present and in the jury-box, the trial herein is resumed.

And the said jurors having heard the evidence produced and the instructions of the court, upon their oaths do say, they find the issues herein joined for the defendant.

82d day.

SATURDAY, *March 16th, A. D.* 1895.

Present: Honorable Moses Hallett, district judge, and Honorable John A. Riner, district judge of the district of Wyoming assigned to the district of Colorado, and other officers as noted on the sixth day of November last past.

And before the Honorable Moses Hallett, district judge, the following proceedings were had:

26 Action for possession of specific real property and for damages.

QUINCY A. SHAW
vs. } 2978.
MURRAY M. KELLOGG.

At this day comes the plaintiff by J. F. Vaile, Esq., his attorney: and thereupon it is considered by the court upon the verdict of the jury heretofore entered herein, that the defendant go hence hereof without day and have and recover of and from the plaintiff his costs by him in this behalf laid out and expended to be taxed and have execution therefor.

And day until sixty (60) days from this day is allowed the plaintiff within which time to file a bill of the exceptions reserved by him upon the trial of the issues herein joined.

And the plaintiff also hereby expressly excepts to the verdict and judgment entered herein.

First day, May term.

TUESDAY, *May 7th, A. D.* 1895.

Pleas in the circuit court of the United States for the district of Colorado, at a term thereof begun and held at the United States court-house, at Denver, on the first Tuesday (it being the seventh day) of May, in the year of our Lord one thousand eight hundred and ninety-five.

Present: Honorable Moses Hallett, district judge. Henry V. Johnson, Esquire, district attorney. Joseph A. Israel, Esquire, marshal. Robert Bailey, Esquire, clerk.

Action for possession of specific real property.

QUINCY A. SHAW
vs. } 2978.
MURRY M. KELLOGG.

At this day comes the plaintiff by J. F. Vaile, Esq., his attorney, and moves the court, to vacate the judgment lately had herein and for a new trial of the issues herein.

And it appearing to the court, that the taxed costs herein, have been fully paid and discharged by the plaintiff.

Therefore, it is ordered, that the judgment lately and on the 16th

day of March last past, had herein, be vacated and for naught
27 held and that a new trial of the issues herein joined, be had in pursuance of the statute in such case made and provided.

Twelfth day.

MONDAY, *May 20th, A. D.* 1895.

Present: Honorable Moses Hallett, district judge, and other officers as noted on the seventh instant.

Action for possession of specific real property.

QUINCY A. SHAW
vs. } 2978.
MURRY M. KELLOGG.

At this day comes the plaintiff by J. F. Vaile, Esq., his attorney and the defendant by J. R. Smith, Esq., his attorney also comes.

And thereupon comes a jury, to wit:

A. J. Sholes,	Geo. Weetman,
O. G. Crawford,	H. L. Roberts,
David Hodgson,	V. De Vinney,
John Harris	Frank Hannigan,
R. B. Williams,	Hero J. Bourk,
David W. Campbell,	Frank Cornforth,

twelve (12) good and lawful men, and they are duly selected and tried, empanelled and sworn, to well and truly try the matter at issue herein joined and a true verdict render according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors being now each duly cautioned by the court, not to converse among themselves or with others touching this cause or the matters at issue herein, or the evidence heard, or any part thereof, nor to listen to such conversation of others, are permitted to retire to meet the court at its next incoming.

28 Thirteenth day.

TUESDAY, *May 21st, A. D.* 1895.

Present: Honorable Moses Hallett, district judge, and other officers as noted on the seventh instant.

Action for possession of specific real property.

QUINCY A. SHAW
vs. } 2978.
MURRY M. KELLOGG.

At this day come again the said parties by their attorneys respectively, and the said jurors being now all here, present and in the jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors being now each duly cautioned by the court, not to converse among themselves or with others touching this cause, or the matters at issue herein or the evidence heard or any part thereof, nor to listen to such conversation of others are permitted to retire to meet the court at its next incoming.

Fourteenth day, May term.

WEDNESDAY, *May 22d, A. D.* 1895.

Present: Honorable Moses Hallett, district judge, and Honorable John A. Riner, district judge of the district of Wyoming, assigned to the district of Colorado, and other officers as noted on the seventh instant.

And before the Honorable Moses Hallett, district judge, the following further proceedings were had:

Action for possession of specific real property.

QUINCY A. SHAW
vs.
MURRAY M. KELLOGG. } 2978.

At this day come again the said parties by their attorneys respectively and the said jurors being now all here present and in the jury-box, the trial herein is resumed.

On motion of the plaintiff, the defendant now here consenting thereto, the allegation as to divers- citizenship in the first paragraph of the complaint is hereby stricken out.

29 And the said (juroes) having heard the evidence on the part of the plaintiff and being thereto by the court instructed, upon their oaths do say, they find the issues herein joined for the defendant.

Wherefore, it is considered by the court, that the defendant go hence hereof without day and have and recover of and from the plaintiff his costs by him in this behalf laid out and expended, to be taxed and have execution therefor.

And day until sixty (60) days from this day is allowed the plaintiff, within which time to file a bill of the exceptions reserved by him upon the trial of the issues herein joined.

Twenty-second day, May term.

SATURDAY, *June 1st, A. D.* 1895.

Present: Honorable Moses Hallett, district judge, and other officers as noted on the seventh ultimo.

Action for possession of specific real property.

QUINCY A. SHAW
vs.
MURRAY M. KELLOGG. } 2978.

At this day comes the plaintiff by J. F. Vaile, Esq., his attorney, and thereupon on his motion, it is ordered by the court, that in the

event, that the plaintiff shall desire to prosecute a writ of error to the United States circuit court of appeals for the eighth circuit, for the purpose of reviewing the decision in this cause, there shall be certified by the clerk of this court direct to the said court of appeals the original exhibits introduced in evidence in this cause numbered and designated as follows, to wit:

No. 15. Photograph of Crestone mountain at the initial corner of Baca Grant No. 4.

No. 16. Photograph of Crestone mountain adjacent to grant.

No. 22½. Official map of the United States accompanying the report of the Secretary of the Interior for the year 1854.

No. 23. Official map of Colorado for the year 1866.

No. 25. Transcript of part of official map of Colorado for the year 1868.

No. 29. Plat prepared by Professor P. H. Van Diest, showing lands adjacent to initial corner.

30 No. 34. Plat of completion survey of northeast corner of Baca Grant No. 4.

No. 35. Manuel of instruction to surveyor general of date February 22nd, 1855.

No. 36. Model and the parts thereof showing profiles of mountains near initial corner.

No. 37. Plat of profiles on natural and exaggerated scale prepared by Mr. Duval.

No. 38. Plat of profiles on exaggerated scale prepared by Mr. Duval.

No. 39. Map of Baca Grant No. 4, showing mountains at northeast corner as determined by the witness Darby.

No. 40. Hayden's geological and topographical map for part of Colorado.

No. 41. Official map of Colorado for the year 1892.

And the said originals be certified to the said court of appeals in lieu of inserting copies thereof in the record.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Bill of Exceptions.

In the Circuit Court.

QUINCY A. SHAW, Plaintiff, }
v. }
MURRAY M. KELLOGG, Defendant. }

Be it remembered that the above-entitled cause coming on for trial before a jury, on the 20th day of May, 1895, the plaintiff, to maintain the issues on his part, introduced the following evidence, to wit:

Act of Congress approved June 21, 1860, and found in 12 U. S. Statutes at Large, pages 71, 72, being as follows:

An act to confirm certain private land claims in the Territory of New Mexico.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the private land claims in the Territory of New Mexico, as recommended for confirmation by the surveyor general of that Territory, and
31 in his letter to the Commissioner of the General Land Office, of the twelfth of January, eighteen hundred and fifty-eight, designated as numbers one, three, four, six, eight, nine, ten, twelve, fourteen, fifteen, sixteen, seventeen and eighteen and the claim of E. W. Eaton, not entered on the corrected list of numbers, but standing on the original docket and abstract returns of the surveyor general as number sixteen, be, and they are hereby, confirmed: Provided, that the claim number nine, in the name of John Scolley and others, shall not be confirmed for more than five square leagues; and that the claim number seventeen, in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed for more than eleven square leagues to each of said claimants.

SEC. 2. And be it further enacted, That in surveying the claim of said John Scolly it shall be lawful for him to locate the five square leagues confirmed to him in a square body in any part of the tract of twenty-five square leagues claimed by him, and that in surveying the claims of said Cornelio Vigil and Ceran St. Vrain, the location shall be made as follows, namely: the survey shall first be made of all tracts occupied by actual settlers holding possession under titles or promises to settle, which have heretofore been given by said Vigil and St. Vrain, in the tracts claimed by them, and after deducting the area of all such tracts from the area embraced in twenty-two square leagues, the remainder shall be located in two equal tracts, each of square form, in any part of the tract claimed by the said Vigil and St. Vrain selected by them; and it shall be the duty of the surveyor general of New Mexico immediately to proceed to make surveys and locations authorized and required by the terms of this section.

SEC. 3. And be it further enacted, That the private land claims in the Territory of New Mexico, as recommended for confirmation by said surveyor general in his reports and abstract marked Exhibit A, as communicated to Congress by the Secretary of the Interior in his letter dated the third of February, eighteen hundred and sixty, and numbered from twenty to thirty-eight, both inclusive, be, and the same are hereby, confirmed, with the exception of the claim numbered twenty-six, in the name of Juan B. Vigil, which claim, numbered twenty-six, is not confirmed.

SEC. 4. And be it further enacted, That the foregoing confirmation shall only be construed as quitclaims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever.

SEC. 5. And be it further enacted, That it shall or may be lawful for the said Juan B. Vigil or any person claiming title under
32 him, to institute suit against the United States for the lands claimed and embraced in said claim number twenty-six, not

confirmed under the provisions of the third section of this act; said suit to be instituted in the supreme court of the Territory of New Mexico, to be defended by the district attorney of the United States for said Territory, under the direction of the Attorney General of the United States, with the right of appeal to either party from the decision of said supreme court to the Supreme Court of the United States, if such appeal be asked for within one year from the rendition of the judgment in said supreme court of the Territory of New Mexico, and not thereafter: Provided, that if the suit authorized by this section be not instituted within two years from the passage of this act, the said claimants shall be presumed to have abandoned all right or title to the lands embraced in said claim number twenty-six, and said lands shall thenceforth be held and deemed to be public lands belonging to the United States: And provided further, that in the determination of the suit authorized to be instituted by the terms of this section, the courts shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

SEC. 6. And be it further enacted, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico, to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: Provided, however, that the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

Approved June 21, 1860.

And further to maintain the issues on his part, the plaintiff introduced various letters and documents, marked and numbered as exhibits, which said letters and documents were severally introduced in the order of their numbers, and are here arranged for convenience of reference in chronological order, to wit:

33 EXHIBIT No. 1.

GENERAL LAND OFFICE, *July 26th*, 1860.

To the surveyor general of New Mexico, at Santa Fé, N. M.

SIR: I have to advise you of the appropriation made by Congress for the surveying service in New Mexico for the fiscal year ending 30 June next, which are as follows:

(Here follow certain statements in relation to appropriations, which are here omitted as not material in this cause.)

In advance of the publication of the laws passed by the last Congress, I herewith transmit you a slip of newspaper containing "An act to confirm certain private land claims in the Territory of New

Mexico," approved June 21, 1860, showing what particular private claims were finally confirmed in addition to those confirmed by the act of Dec. 22, 1858. You are directed thoroughly to digest the provisions of the act of Congress, approved June 21, 1860, and to issue the appropriate instructions as to the priority of surveys particularly mentioned in our letter to the surveyor general of New Mexico, under date of April 23rd, 1859, above alluded to, viz:

"It will be your duty first, to survey and separate from the public lands such of the pueblos or individual confirmed claims as now fall within the range of the public surveys, and then you will hereafter proceed in that service by attending to the localities of such confirmed private claims as are nearest to the lines of the public surveys, so that exact and perfect connections therewith shall be kept up, and the immediate connections properly made and closed on the boundaries of the same, when the lines of public surveys advance around them."

In this connection I have to draw your special attention to the 6th section of the said act of June 21, 1860, that section refers to the claim of the heirs-at-law of Luis Maria Baca, which is entered as No. 20 in surveyor general's report, dated Sept. 1, 1859, and the abstract marked Exhibit "A," submitted by the Secretary of the Interior, under date of Feb. 3, 1860, to Congress, and as that land is also claimed by the town of Las Vegas under said No. 20 in the aforesaid report, this law gives the land to the Vegas town claim and allows the Baca heirs to take an equal quantity of vacant land not mineral, in New Mexico, to be located by them in square bodies not exceeding five in number. To give this law timely effect, you will give priority in surveying private claims to this claim,
34 particularly as it is in the vicinity, about 4 miles of the existing lines of the public surveys. You will proceed to have the exteriors of Las Vegas town claim properly run and connected with the lines of the public surveys. The exact area of the Las Vegas town tract having been thus ascertained, the right will accrue to the Baca claimants to select a quantity equal to the area of the town tract elsewhere in New Mexico of vacant land, not mineral, in square bodies not exceeding five in number.

You will furnish them with a certificate, transmitting at the same time a duplicate to this office, of their right and the area they are to select in five square parcels. Should they select in square forms according to the existing line of the public surveys, the matter may be properly disposed of by their application duly endorsed and signed with your certificate designating the parts selected by legal divisions or subdivisions, and so selected as to form five separate bodies in square form. Then the certificate thus endorsed is to be noted on the records of the register and receiver at Santa Fé, and sent on here by those officers for approval. Should the Baca claimants select outside of the existing surveys, they must give such distinct descriptions and connection with natural objects in their applications to be filed in your office, as will enable the deputy surveyor when he may reach the vicinity of such selections in the regular progress of the surveys, to have the selections adjusted as

near as may be to the lines of the public surveys, which may hereafter be established in the region of those selections.

In either case the final condition of the certificate to this office, must be accompanied by a statement from yourself and register & receiver that the land is vacant and not mineral.

In reference to other finally confirmed private claims, I deem it unnecessary for me to recapitulate the duties devolved upon the surveyor general under the law, as set forth in the act of June 21, 1860, the provisions thereof being plainly and distinctly drawn up and with abundant details to enable you to carry out the law into effect.

As the appropriation of ten thousand dollars as afor-said contemplates the survey of the public lands as well as private land claims in New Mexico, you will contract for the survey of the former to the extent of $3,000 and for the latter of $6,000 leaving the residue of $1,000 for contingent expenses incident to the surveying service in the field.

The attention of this office having been drawn to the fact that in the vicinity of Fort Stanton, there are several hundred
35 families pursuing pastoral and agricultural avocations, and who are desirous of securing their settlements and improvements under the laws, you are directed to extend east the 2d correction line south in place if practicable, and if not practicable, then *by offsets*, in so *far only*, as to *obviate* the *unsurmountable* obstacles in the way. The extension of said line is to be the distance necessary to afford the basis for the subdivisional survey near Fort Stanton so as to enable you to embrace those settlements within the same, and close the lines of the public surveys on the reserve surveyed under the War Department and ordered by the President on the 12th May, 1859, to be reserved for military purposes. Copy of the plat of that survey was sent to the surveyor general of New Mexico with our letter of the 3d June, 1859. You will please promptly acknowledge the receipt of these instructions.

I am, very respectfully, your ob't servant,

JOS. S. WILSON,
Commissioner.

Certified by the Commissioner of the General Land Office, under the seal of said office, the 17th day of December, 1894.

(EXHIBIT No. 2.)

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *December 8th*, 1860.

Hon. Tomas Cabeza de Baca, legal representative of the heirs of Don Luis Maria Baca, dec'd.

SIR: I hereby certify that the grant to the town of Las Vegas, has been surveyed under instructions from this office, and according to the laws of the United States, and that the acres- of said tract of land is 496,446.96 acres.

Under the act of Congress approved June 21st, 1860, (sec. Statutes at Large, page 71) the heirs of Luis Maria Baca are entitled to select in not more than five square bodies, the amount of land equal to said area, upon any of the unoccupied lands, not mineral, of New Mexico, and the surveyor general is authorized to survey and locate the same; therefore I notify you that this office is ready to
36 co-operate with you, and receive your application, for the location of the lands granted by the Government.

A. P. WILBAR,
Surveyor General of New Mexico.

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *December 8th*, 1860.

SIR: Enclosed please find duplicate of the certificate in regard to the Las Vegas grant issued from this office, to the legal representative, of the heirs of Luis Maria Baca.

Yours very respectfully, A. P. WOLBAR,
Surveyor General.

Hon. Jos. S. Wilson, Com'r Gen'l Land Office.

Certified by the Commissioner of the General Land Office, under the seal of said office, the 17th day of April, 1895.

(EXHIBIT No. 3.)

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, *February 9th*, 1863.

SIR: Please find enclosed herewith, the application of the heirs of Luis Maria Baca, to locate one-fifth of the private claim confirmed to them under the act of Congress approved June 21, 1860. This location falls within the Territory of Colorado but within the limits of New Mexico as they existed at the date of the approval of the act confirming this claim.

I have transmitted a copy of the enclosed to the surveyor general of Colorado, to enable him, when required to make the survey.

I am very respectfully, your ob't serv't,

JOHN A. CLARK,
Surveyor General of New Mexico.

Hon. J. M. Edmunds, Com'r of General Land Office, Washington city, D. C.

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *February 5th*, 1863.

I, John A. Clark, surveyor general of New Mexico, do hereby certify that, on this day, John S. Watts, Esq., in behalf of the
37 heirs of Luis Maria Cabeza de Baca, filed in this office an application in the words and figures following, viz:

"SANTA FÉ, NEW MEXICO, *December 12th*, 1862.

To Surveyor General John A. Clark, surveyor general of New Mexico:

I John S. Watts, attorney of the heirs of Luis Maria Baca, have this day selected as one of the five locations, belonging to the said heirs, under the 6th section of the act of Congress approved June 21st, 1860, a tract of land in the Territory of New Mexico, described as follows:

Beginning at a point on the eastern edge of the valley of San Luis, where the thirty-eighth parallel of north latitude crosses the base of the snowy range, dividing the waters of the Rivers Arkansas and Del Norte; thence east along said parallel, four and one-half miles; thence south along a meridian line twelve miles, thirty-six (chains) and forty-four links distance; thence west at a right angle twelve miles, thirty-six chains and forty-four links distance; thence north to the said specified parallel of latitude; thence east with said parallel to the place of beginning.

I further state that the said land is entirely vacant, not claimed by any one, is not mineral, but located for purposes of arable and pastoral agriculture, and is within the limits of the Territory of New Mexico as established in the organic act. I hereby accordingly make application for the survey and location of the tract of land in accordance with the provisions of the ab-ve act of Congress.

JOHN S. WATTS,
Attorney for Heirs of Luis Maria Baca."

And I further certify that the said tract of land being the one-fifth part of the private claim confirmed to said heirs, contains ninety-nine thousand, two hundred and eighty-nine acres and thirty-nine hundredths of an acre, and that this location is the fourth of the series, and with the three locations heretofore made numbered one, two & three, includes four-fifths of the said private claim confirmed to the heirs of Luis Maria Cabeza de Baca by the act of Congress approved June 21, 1860.

38 In witness whereof I have hereunto set my name this fifth day of February, A. D. 1863.

JOHN A. CLARK,
Surveyor General of New Mexico.

Certified by the Commissioner of the General Land Office, under the seal of said office, the 17th day of December, 1894.

(EXHIBIT A.)

SURVEYOR GENERAL'S OFFICE,
DENVER, CO. TY., *Feb'y 24th*, 1863.

Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C.

SIR: I have the honor to report that I have this day received from the surveyor general of New Mexico a copy of the application of the att'y of the heirs of Luis Maria Baca for the location of one

of the five locations belonging to said heirs under the act of June 21st, 1860, dated Dec. 12th, 1862. The description of the tract selected is as follows: "Beginning at a point (?) on the eastern edge of the valley of San Luis where the thirty-eighth parallel of north latitude crosses the base of the snowy range dividing the waters of (*the waters of*) the River Arkansas and Del Norte, thence east along said parallel four and one-half miles; thence south along a meridian line twelve miles, thirty-six chains and forty-four links distance; thence west at a right angle twelve miles, thirty-six chains and forty-four links distance; thence north to the said specified parallel of latitude; thence east with said parallel to the place of beginning."

I suppose this selection has been made by ex-Gov. Gilpin, as he told me last summer he was in possession of one of the Baca "floats," and should locate it as this is located, for the reason that in his opinion, it would cover rich minerals in the mountains.

Very truly yours ob't serv't,

FRANCIS M. CASE,
Surv. Gen'l Colo. & Utah.

Certified by surveyor general of Colorado, May 18th, 1895.

EXHIBIT "D."

GENERAL LAND OFFICE, *March 13th*, 1863.

Surveyor general, Colorado and Utah, Denver city, Colorado Ty.

SIR: I am in receipt of your communication dated the 24th of February last, reporting that you have received from the
39 surveyor general of New Mexico a copy of the application of the attorney of the heirs of Luis Maria Baca for the location of one-fifth of the private claim confirmed to said heirs—the location being within the limits of New Mexico as they existed at the date of the confirmation, but falling within what is now the Territory of Colorado.

It is necessary before the application can be approved by this office, that it be accompanied by the certificates of the surveyor general and the register & receiver that the land selected *is vacant and not mineral.* This is in accordance with our instructions to the surveyor general of New Mexico, extracts from which were furnished your office in our communication of June 7th, 1862; especially should the character of the location as to minerals be carefully ascertained after the important statement of ex-Governor Gilpin which you communicated in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable you to do, you will transmit to this office your official certificate setting forth these facts.

You will also correspond with the register and receiver of Colorado, when they enter upon their official duties, communicating to them the substance of this communication, and call upon them to furnish their certificate, when able, under the same conditions that

your own is to be furnished under, which when received you will forward to this office.

Very respectfully, your ob't serv't,

(Signed) JOS. S. WILSON,
Acting Commissioner.

(EXHIBIT B.)

SURVEY-GENERAL'S OFFICE,
DENVER, C. T., *Oct. 13th*, 1863.

SIR: On the 3d day of October of the present year William Gilpin, as representative of the heirs of Luis Maria Baca, filed in this office an application for the survey of Grant No. 4 of the grants confirmed by the said heirs by act of Congress of June 21st, 1860, a copy of which application is herewith submitted.

Mr. Gilpin further represented that he was desirous of taking immediate possession and improving the said grant, and that to do so it would be necessary to have the survey made during the next six weeks to avoid the deep snow which would render the survey impossible.

40 I informed him that the instructions in this office forbid making the survey of any grant situated more than six miles from existing lines of public surveys, but as his grant was in a part of the country which it would probably be some time before the lines of survey would reach, I would order the survey and make a contract subject to your approval. A copy of my reply to his application is herewith submitted.

As there is as yet no United States depository in operation in this country, Mr. Gilpin deposited the money with me and took my receipt for the same, a copy of which receipt is herewith enclosed. The money is in my hands subject to your order as to the disposition of it, but in case of the non-approval of the contract, the money was to remain in my hands until the survey was finished and to be paid to the deputy for work done, the survey being considered private and not official. This was done in order to secure myself and the deputy, as Mr. Gilpin wished the deputy to take the field immediately.

I transmit herewith the copy of a contract made with Deputy Surveyor A. Z. Sheldon for the survey of the above-mentioned grant, and also my instructions to said deputy. I have acted in this matter as in my judgment seemed best under the circumstances, and hope it will meet your approval.

Very respectfully, your ob't serv't,

JOHN PIERCE,
Surveyor General of Colorado and Utah.

Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C.

Certified by the surveyor general of Colorado the 18th day of May, 1895.

(EXHIBIT C.)

GENERAL LAND OFFICE, *November 2nd*, 1863.

John Pierce, Esq., surveyor general, Denver, Col. Ter.

SIR: In reply to your communication of the 12th ultimo covering contract instructions and contract with Deputy Surveyor A. Z. Sheldon for the survey of Grant No. 4 of the Baca heirs, I have to say this office cannot approve said contract. In your letter dated the 10th March last transmitting the application of the at-
41 torney of said heirs for the location of this claim, you say, "I suppose this selection has been made by ex-Gov. Gilpin, as he told me last summer he was in possession of one of the Baca floats, and should locate it as this is located, for the reason that, in his opinion, *it would cover rich minerals* in the mountains."

Upon receipt of your letter you were expressly informed, under date of the 13th March, 1860, that before the application could be approved it must be accompanied by the certificates of the surveyor general and the register and receiver that the land is *vacant and not mineral*, and I then took occasion to communicate the following explicit instructions: "Especially should the character of the locations as to minerals be carefully ascertained after the important statement of ex-Gov. Gilpin which you communciate in your official letter to this office: Whenever you shall acquire good and satisfactory information that the lands included in the selection are vacant and not mineral, to enable you to do so you will transmit to this office your official certificate setting forth these facts."

In our communication of the 7th June, 1862, you were also furnished with extracts from our instructions to the surveyor general of New Mexico, referring to the location of these claims, in which it was plainly indicated that should selections be made outside of the existing surveys, the survey thereof must be postponed until the vicinity is reached by the regular progress of the public surveys. You will be guided in your official acts by our instructions, which are full and explicit in relation to the location of the claims referred to. The contract and instructions for the survey of the above-mentioned claim are herewith returned.

Very respectfully, your ob't serv't,

J. M. EDMUNDS,
Commissioner.

Certified by the surveyor general of Colorado the 18th day of May, 1895.

EXHIBIT 4.

SURVEY-GENERAL'S OFFICE,
DENVER, C. T., *Dec. 5th*, 1863.

SIR: This is to certify that from good and sufficient evidence I am perfectly satisfied that the land on which the heirs of Luis

Maria Baca have located their Grant No. 4, in the San Luis
42 valley, and marked out by a survey made by Albinus Z. Sheldon, in November, 1863, is not mineral and is vacant.

Very truly, your ob't serv't. JOHN PIERCE,
Surveyor General of Colorado and Utah.

EXHIBIT No. 5.

COLORADO TERRITORY, GOLDEN CITY, *Dec. 5th*, 1863.

SIR: This is to certify that from good and sufficient evidence we are perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their Grant No. 4, in the San Luis valley, and marked out — a survey made by Albinus Z. Sheldon, in November, 1863, is not mineral and is vacant.

G. N. CHILCOTT,
Register Land Office, Colo. Dist.
C. B. CLEMENTS,
Receiver Land Office, Colo. Ty.

Hon. J. M. Edmunds, Comm. Gen'l Land Office, Washington, D. C.

(EXHIBIT E.)

SURVEYOR GENERAL'S OFFICE,
DENVER, C. T., *Dec. 12th*, 1863.

SIR: I have the honor to acknowledge the receipt of your letter of the 2nd of Nov. last disapproving of the contract for the survey of Grant No. 4 of the floats belonging to the heirs of Luis Maria Baca.

I herewith transmit my certificate that the lands are "not mineral and are vacant." You refer to a letter of the former surv. gen'l of this district, in which he says that he supposes that this location was made by Mr. Gilpin "for the reason that in his opinion it would cover rich mineral lands." I do not believe that at the time Mr. Case wrote that letter he had the least idea that the float as located covered any mineral lands. I have signed the accompanying certificate partly from my own knowledge of the country, but mostly for the following reasons:

1st. The discoveries of gold thus far go to show that the gold lands of Colorado commence at the base of Long's peak and extend
43 in a course about 30° west of south to the head-waters of the San Juan covering a belt of country, about 30 miles in width of which the line indicated will be near the western boundary: outside of this no gold or silver lodes have been discovered.

2nd. The grant is located on the great line of travel between Denver and Santa Fé, and thousands of experienced miners have been travelling of the Sangre de Christo and Mosca passes and have found no gold or other valuable minerals.

3rd. In the summer of 1860 a party of one hundred and fifty miners from here under one Roeder went to the San Luis valley and prospected the whole of the Sangre de Christo range, but found

no gold anywhere on the eastern run of the park. Many of the men who were in this expedition have been in my employ, and from them I have had this history of the expedition.

Such are the grounds on which I have signed the certificate, and to me they are satisfactory.

The survey as made by Mr. Sheldon is probably as near perfect as can be made, as the mountains at the northeast corner of the grant are inaccessable at any time of the year.

I have refunded to Mr. Gilpin the money placed in my hands, and he has paid for the survey as a private survey, though he has permitted me to make an abstract of the field-notes, which I have placed on file in this office.

Your letter of Nov. 16th granting me a leave of absence is also received. The cold weather has so protracted the surveys that I cannot avail myself of it, though it is possible I may wish to visit the States some time during the winter or spring.

Very truly, your ob't serv't, JOHN PIERCE,
Surv. Gen'l of Colorado & Utah.

Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C.

Certified by the surveyor general of Colorado the 18th day of May, 1895.

(EXHIBIT F.)

GENERAL LAND OFFICE, *January 16th*, 1864.

John Pierce, Esq., surveyor general, Denver city, C. T.

SIR: Your letter of the 14th Dec. last with inclosed certificate relating to the 4th location of the Baca heirs is received.

44 The act of 21st June, 1860, confirming the claim of Luis Maria Baca, authorized the heirs of said Baca to select in lieu of the tract claimed by the town of Las Vegas, an equal quantity of *vacant* land *not mineral*. With a view to carry out the requirements of the law, the surveyor general of Colorado was required in our instructions of June 7th, 1862, to accompany the final rendition of the certificate with his own statement, and also that of the register and receiver setting forth the fact that the land selected is vacant and not mineral. Those instructions were reiterated in our letter of March 13th, 1863.

The evidence furnished by you is not sufficient in the opinion of this office, to prove that the selection No. 4 does not cover valuable mineral deposits. Your certificate is not based upon actual knowledge of the facts, but upon the information and conclusions deduced from reasoning. This kind of proof is not deemed sufficient when large public interests may be involved, and the character of the location is made still more doubtful by the statement of ex-Governor Gilpin officially communicated to this office by Surveyor General Case, that there are mineral lands in that locality.

The statement of the register and receiver required in our instructions is also wanting.

The approval of the selection will stand suspended until some satisfactory proof is obtained upon the points indicated.

Very respectfully, your ob't serv't,

J. M. EDMUNDS,
Commissioner.

Certified by the surveyor general of Colorado the 18th day of May, 1895.

(EXHIBIT No. 18.)

GENERAL LAND OFFICE, *February* 12, 1864.

John Pierce, Esq., surveyor general, Denver city, Colo.

SIR: I have considered your report of the 14th December last respecting the survey made in November, 1863, by Deputy Surveyor Albinus Z. Sheldon, of what is known as the Luis Maria Baca float in San Luis park in Colorado and containing 92,293 acres.

45 (You*r*) transmit your certificate "that the lands are not mineral and are vacant," and state under specific heads "the grounds on which" you "have signed the certificate" and which are satisfactory to you. You report further that "the survey as made by Mr. Sheldon is probably as near perfect as can be made, as the mountains at the northeast corner of the grant are inaccessible at any time of the year."

The act of Congress approved 21st June 1860, U. S. Statutes at Large, vol. 12, page 71, chap. 167, confers authority for the location of the said Baca float in the then Territory of New Mexico, but now a part of Colorado Territory.

The said statute makes it the "duty of the surveyor general of New Mexico" now in your jurisdiction "to make survey and location of the lands so selected by the heirs of Baca when thereunto required by them" with a proviso making a three years' limitation to the statute.

You*r* further report that you have refunded to Mr. Gilpin the money placed in your "hands and he has paid for the survey as a private survey, though he has permitted" you "to make an abstract of the field-notes which" you "have placed on file in" the surveyor general's office.

This part of the proceedings is irregular. Under statutory requirements it is obligatory upon private claimants to pay for the survey of confirmed private claims, but the work must be done under the usual obligations and responsibilities both of deputies & surveyor general.

The difficulty, however, may be avoided by pursuing the following course: The original field-notes, duly verified and authenticated, must be filed in the surveyor general's office of Colorado upon bringing these to the usual satisfactory tests, and finding the same all regular and correct you are authorized, in virtue of the aforesaid 6th section of the said act of 21st June, 1860, to approve the said survey, but in your certificate of approval you will add the special reservation stipulated by the statute—but not to embrace mineral land, nor to interfere with any other vested rights if such exist.

The statute does not order the issue of a patent. The aforesaid law of 21st June, 1860, with your plat approved in the manner indicated, will therefore constitute the evidence of title.

You will take care so to arrange the matter that hereafter when in the gradual progress of the lines of the public surveys, they
46 shall reach the Baca location they shall be properly connected therewith and so appear on the township plats.

Very respectfully, your ob't serv't,

J. M. EDMUNDS,
Commissioner.

Certified by the Commissioner of the General Land Office, under the seal of said office, the 27th day of April, 1894.

EXHIBIT No. 17.

GENERAL LAND OFFICE, *Feb'y 26th*, 1864.

John Pearce, Esq., surveyor general, Denver city, Colorado T.

SIR: At the request of Wm. Gilpin, Esq., I herewith transmit the following papers, to wit:

First. Mr. Gilpin's application for the survey of Grant No. 4 of the heirs of Baca, dated Oct. 3rd, 1863.

Second. Surveyor general's estimate of the cost of said survey, dated Oct. 5th, 1863.

Third. Surveyor general's receipt for $600, deposited by Mr. Gilpin to pay for the above survey, October 6th, 1863.

Fourth. Certificate of the register and receiver at Golden City, Colorado, that the lands covered by the said Grant No. 4 are not mineral and are vacant, December 5th, 1863.

Fifth. The field-notes of the boundary lines of the above grant, together with plat thereof.

These papers were deposited in this office by Mr. Gilpin and are transmitted to you for such action as you shall deem proper in the premises in accordance with the views expressed in our communication to you, dated the 12th instant.

Very respectfully your obedient servant,

J. N. EDMUNDS,
Commissioner.

EXHIBIT No. 6.

Boundary of Grant No. 4.

Field-notes of the survey of Grant No. 4, in the San Luis valley, Colorado Territory, by Albinus Z. Sheldon, deputy surveyor,
47 under his contract bearing date the 7th day of October, 1863.

Survey commenced October 22nd and concluded November 4th, 1863 *4th, 1863.*

List of Names.

A list of the names of the individual employed to assist in running, measuring or marking the lines and corners described in the following field-notes of Grant No. 4, showing the respective capacities in which they acted.

Robert Finley, Milton Hadley, chainmen.
James H. Woodworth, mound-builder.
James H. Woodworth was sworn in as flagman, but in consequence of being short a hand, when we arrived in the field he was employed as mound-builder.

Camp near a log cabin on the left bank of La Riviere Trois Tetons. By observation of the sun at meridian my instrument gives us a latitude of 38° 01′ 15″ N. By an observation of the polar star at 11 o'clock p. m. my instrument gives for our latitude 37° 57′ 47″ north.

Difference between solar and stellar observations 3′ 28″.

OCTOBER 22ND, 1863.

Repeat observations of the meridian passage of the sun.
Result 38° 01′ 21″ north latitude.
Make observation of the polar star and obtain for our latitude 37° 57′ 53″ N.
Difference between solar and stellar observations 3′ 28″.

OCTOBER 23RD.

I again make observation of the sun's meridian passage and obtain for our latitude 38° 01′ 18″ north. The sky becoming obscured by clouds I am prevented from repeating my observations of the polar star.

The mean of my solar observations is..... 38° 01′ 18″
The mean of my stellar observations is..... 37° 57′ 50″
And the mean of these results is..... 37° 59′ 34″

48 I therefore find that I am 26″ or 40 chains south of the 38th parallel of latitude north.

OCTOBER 24TH.

Commencing at the point where the observations hereinbefore mentioned noted were made, I run north on a random line 40 chains to the 38th parallel north latitude; thence east along said parallel 240.00 chains, the variation being respectively for the 1st, 2nd and 3rd miles 15° 00′ east; 15° 16′ east; 15° 16′ east to the base of the range which divides the waters of the Arkansas and Del Norte rivers and establish the initial point of the survey. Set a granite stone 18 inches long, 12 inches wide and 8 inches thick marked "I. C." for the initial corner.

Chains. East on the northern boundary of Grant No. 4, variation 15° 00′ east.

40.00 Set a blue granite stone 18 inches long, 16 inches wide and 8 inches thick, marked "½" for half-mile corner.

49.50 To La Riviere "Trois Tetons," 10 links wide, flows S. 60° W.

60.80 Enter La Riviere "Trois Tetons," flows N. W.

62.50 Leave La Riviere "Trois Tetons," flows west.

80.00 Set granite stone 24 inches long, 12 inches wide and 6 inches thick, marked No. 1, for the first mile monument.

Land mountainous and rocky. Timber pinion, cedar, aspen, pine and fir.

East on the second mile, north boundary of Grant No. 4. Variation 15° 00′ east.

38.50 Summit of ridge 3,000 feet above the plain bears N. E. and S. W.

40.00 Set a blue-granite stone 18 inches long, 12 inches wide and 6 inches thick, marked "½" for half-mile monument.

46.00 Descend ridge.

OCTOBER 26TH.

52.25 Enter northwest side of small grassy park, containing about 100 acres, bears N. E. and S. W.

52.50 Offset south 7.00 chains, from which a point of the peak in front, intersected by boundary line bears N. 87° E. Angle of elevation 18°.

53.00 Spring branch 111 links wide, flows S. W.

71.00 Leave park and enter aspen and fir timber, bears N. and S.

49

78.00 Leave bottom appertaining to the park and ascend steep rocky mountain, bears N. W. and S. W.

80.00 N. W. corner of a granite rock 10 feet long, 8 feet wide and 4 feet thick, which we mark No. 2 for the second mile monument. Land west 52.25 chains and east 2.00 chains, rocky and mountainous, remainder low and marshy. Timber, fir, aspen, pine and spruce. The mountain in front of us is utterly impracticable. In our immediate presence is a precipitous wall of granite; and from this point to its crest there is a succession of such, only higher and more difficult. I see no way of surmounting the difficulty by offsets or otherwise and therefore am compelled to abandon the survey at this point.

Chains. Returning to the initial monument I run west along the 38th parallel of north latitude. Variation 15° 06′ east.

2.80 Cedar 30 inches in diameter.

40.00 Set a granite rock 17 inches long, 14 inches wide and 9 inches thick, marked "½" for half-mile monument.

80.00 Set a blue sandstone 20 inches long, 14 inches wide, and 3 inches thick, marked "No. 49" for the (fort*h*)-ninth mile monument.

Land descending to the S. W. 3rd rate. Timber pinon and pine.

West on the forty-ninth mile. Variation 15° 16′ east.

6.00 Leave pinion timber and enter pra-rie, bears N. and S.

28.00 Leave upland and enter bottom, bears N. and S.

30.00 Enter scattering timber, bears N. E. and S. W.

40.00 Drive charred stake and set post in mound with trench as per instructions for ½-mile boundary mark.

54.50 Enter undergrowth, bears N. E. and S. W.

55.45 North branch of La Riviere "Trois Tetons" (dry) 10 links wide, bears N. E. and S. W.

56.50 The same, bears N. W.

59.00 The same, bears S. W.

63.00 Leave scattering timber and undergrowth and enter prairie, bears N. E. and S. W.

80.00 Drive charred stake and set post in mound with trench as per instructions, for the forty-eighth-mile boundary mark.

50

Land east 28.00 chains gradually descending to the west remainder level bottom soil 1st rate. Timber, pinion and cottonwood; undergrowth, willow and alder.

Chains. West on the (fort*h*) eight-mile. Variation 15° 00′ east.

40.00 Drive charred stake and set post in mound with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for the forty-seventh boundary mark.

Land level. 2nd rate.

OCT. 27TH.

West on the forty-seventh mile. Variation 14° 57′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for forty-sixth-mile boundary mark.

Land level and sandy. 2nd rate.

OCT. 28TH.

West on the forty-sixth mile. Variation 14° 48′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of forty-fifth mile.

Land east ½ mile, level. West half mile gently rolling. Soil 2nd rate.

Chains. West on the forty-fifth mile. Variation 14° 30′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of forty-fourth mile. Land level; soil sandy loam, and abounding in greasewood, gramma grass and cactus.
West on the forty-fourth mile. Variation 14° 13′ east.

51

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of forty-third mile.
Land level; abounding in artemisia; soil good; 2nd rate.
West on the forty-third mile. Variation 13° 48′ east.

40.00 Drive charred stake and set post in mound, with trench as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of the forty-second mile and northwest corner of Grant No. 4.
Mark post "N. W. cor. Grant No. 4."
Land level, abounding in artemisia. Soil good. 2nd rate.
Pinion point on the west side of the valley bears west.
Point of bluff where the Del Norte debouches into the valley bears S. 55° 32′ west.

Chains. From this corner I run south on the west boundary of Grant No. 4 and the forty-second mile.
Variation 13° 43′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, *with trench*, for boundary mark of forty-first mile.
Land level; good soil and covered with artemisia.
South on the forty-first mile; west boundary.
Variation 13° 43′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of fortieth mile.
Land part of a wide savannah formed by the absorption of La Riviere "Trois Tetons," extending westward beyond the view, and densely covered with grass. Portions of it in high water, subject to overflow. Soil rich.

52

South on the fortieth mile, west boundary.
Variation 13° 23′ east.

28.80 Dry bed of "Trois Tetons" creek, 10 links wide, bears S. W.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

Chains.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of thirty-ninth mile.

Land level bottom; soil 1st rate; heavy growth of grass.

South on the thirty-ninth mile, W. boundary.

Variation 14° 02′ east.

11.50 Variation 13° 33′ east.

36.00 Variation 13° 18′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of thirty-eighth mile.

Land level and 1st rate; south ½ mile yielding artemisia.

OCT. 28TH.

South on the thirty-eighth mile, W. boundary.

Variation 13° 14′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

40.25 Variation 13° 26′ east.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of thirty-seventh mile.

Land, uneven bottom. 1st-rate soil.

Chains.

South on the thirty-seventh mile, W. boundary.

Variation 13° 26′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench as per instructions, for boundary mark of thirty-sixth mile.

53

Land, uneven bottom interspersed with sink-holes.

Soil 1st rate.

South on the thirty-sixth mile, west boundary

Variation 13° 33′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for mile boundary mark of thirty-fifth mile.

Land, uneven bottom; good 2nd rate.

South on the thirty-fifth mile, west boundary.

Variation 13° 41′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of thirty-fourth mile.

Land, uneven bottom. Soil, good 2nd rate.

Chains.

South on the thirty-fourth mile, west boundary.
Variation 13° 36′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of thirty-third mile.

Land, uneven bottom. Soil, good 2nd rate.
South on the thirty-third mile, W. boundary.
Variation 13° 36′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of the thirty-second mile W.

Land, level bottom. Soil, 1st rate.
South on the thirty-second mile, west boundary.
Variation 13° 45′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of thirty-first mile.

Land, level bottom. Soil 1st rate.

54

Chains.

South on the thirty-first mile, west boundary. Variation, 13° 45′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of thirtieth mile. This mile, with the last two miles and the ½ mile succeeding, is part of extensive savan-ah formed by the Chatillon creek.

South on the thirtieth mile, west boundary.
Variation 13° 45′ east.

36.44 Drive charred stake and set post marked "S. W. corner Grant No. 4," in mound, with trench, as per instructions, for S. W. corner of the grant. From this corner pinion point bears N. 60° 47′ west: bluff on Del Norte S. 81° 27′ west: mesa in the park, on the right bank of the Del Norte (west end) south: same mesa (east end) bears S. 2° 57′ E. north peak of the Sierra Blanca, S. 53° 42′ E. From this corner, I run on the thirtieth mile east, on the south boundary of Grant No. 4. Variation 13° 45′ east.

40.00 Drive stake charred, &c.
76.00 Enter bullrushes, bear N. and S.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of twenty-ninth mile.
Land, level bottom. Soil, 1st rate.

Chains.
East on the twenty-ninth mile, south boundary.
Variation 13° 45′ east.
3.50 Leave bullrushes; bears N. E. and S. W.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary of twenty-eighth mile.
Land level. Soil, 1st rate.
East abounding in artemisia.

OCTOBER 31ST.

East on the twenty-eighth mile, south boundary.
Variation, 13° 45′ east.
55
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of twenty-seventh mile.
Land level. Soil, sandy; 1st rate.
East on the twenty-seventh mile, south boundary.
Variation 14° 08′ east.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark twenty-sixth mile.
Land, gently rolling. Soil, sandy. 2nd rate.
Growth, artemisia and gramma grass.

Chains.
East on the twenty-sixth mile, south boundary.
Variation, 14° 08′ east.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench, as per instructions for boundary mark of twenty-fifth mile. Land, gently rolling, sandy, and abounds in artemisia and sage bush. 2nd rate.
East on the twenty-fifth mile, south boundary.
Variation, 14° 08′ east.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of the twenty-fourth mile.
Land, gently rolling, sandy, and abounding in artemisia; 2nd rate.
East on the twenty-fourth mile, south boundary.
Variation, 14° 24′ east.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of twenty-third mile.
Land rolling, sandy, and abounding in artemisia.
Soil, 2nd rate.

56

Chains.

East on the twenty-third mile, south boundary.
Variation, 14° 33′ east.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench as per instructions, for boundary mark of twenty-second mile.
Land, rolling, sandy and abounding in artemisia.
Soil, 2nd rate.

NOV. 1ST, 1863.

East on the twenty-second mile, south boundary.
Variation, 14° 39′ east.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of twenty-first mile.
Land rolling, sandy and abounding in artemisia.
Soil, 2nd rate.
East on the twenty-first mile, south boundary.
Variation, 14° 48′ east.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of twentieth mile.
Land, rolling and sandy. Soil 2nd rate.

Chains.

East on the twentieth mile, south boundary.
Variation, 14° 57′ east.
17.00 Enter barren sand hills, formed by the wind: bear N. E. and S. W.
27.00 Enter dry bed of the Rio Arenas 450 links wide; bears south.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of nineteenth mile.

Land, barren sand hills, worthless.

57

East on the nineteenth mile, south boundary.

Variation, 15° 00′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of eighteenth mile.

Land, barren sand hills.

East on the eighteenth mile, south boundary.

Variation, 15° 03′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

72.88 Drive charred stake and set post in mound, with trench, as per instructions, for "S. E. corner of Grant No. 4." This post is marked, "S. E. corner of Grant No. 4."

Chains. The mesa in the park, on the right bank of the Del Norte, (west end), bears S. 16° 55′ W. Same mesa (east end), bears S. 13° 32′ W. North peak of the Sierra Blanca bears S. 18° 30′ E.

The south boundary line, if produced east, will intersect the mountains near the Mosca pass, about eight miles distant. I shall not obtain a sufficient base on the east boundary line, to triangulate it. From this corner, I run continuing the eighteenth mile north on the east boundary of Grant No. 4.

Variation, 14° 26′ east.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of the seventeenth mile.

Sand hills, some of which are 1,000 feet high.

North on the seventeenth mile, east boundary.

Variation, 14° 42′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary of sixteenth mile.

Land, barren sand hills.

58

Chains. North on the sixteenth mile, east boundary.

Variation, 15° 00′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

42.50 Leave sand hills and enter bottom of the Rio Arenas, bears E. and W.

43.00 Enter timber, bears E. and W.
48.30 Rio Arenas, 25 links wide, flows west.
52.50 Leave bottom and enter rolling land, bears E. and W.
53.00 Leave timber, bears E. and W.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of the fifteenth mile.

Land, south 42.50 chains, barren sand hills; remainder rolling and sandy. 3rd rate. Timber, cottonwood, cedar and alder.

NOVEMBER 3RD, 1863.

North on the fifteenth mile, east boundary.
Variation, 15° 00′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of fourteenth mile.

Land, rolling and sandy. 3rd rate. Growth, artemisia.

Chains. North on the fourteenth mile, east boundary.
Variation, 15° 00′ east.
10.00 Enter pine and pinon timber, bears E. and W.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
44.00 Variation, 15° 15′ east.
65.00 Ascend steep mountain, bears N. W. and S. E.
75.00 Summit of ridge, 1,000 feet above the plain, bears E. and W.
80.00 Set a blue granite stone in a gulch: stone 14 inches long, 12 inches wide, and 6 inches thick, marked No. 13 for boundary monument of the thirteenth mile.

Land south ½ mile, hilly and sandy, the entire mile, declining rapidly to the south and west; soil worthless.

59

Timber, pinon, pine, cedar and aspen.

From this point to the N. E. corner of the grant the mountains are very rugged, precipitous and deeply covered with snow. The line, if at all, could be carried through only with great difficulty and with a result, with respect to accuracy, which could serve but little to any practicable purpose. I therefore deem it advisable, as indeed it seems compulsory, to abandon the line at this point.

NOVEMBER 4TH, 1863.

Note.

In the observations for latitude the seconds were obtained by observing, with an eye-glass, the spaces intercepted between the graduated points of the instrument, the actual graduation being only to minutes. These observations were made with great care and approximate the true reading very nearly.

The stakes are numbered as they should have been had the survey been continued from the initial point to the N. E. corner, and so on, with this exception: Notwithstanding the chaining was carefully made on the mountain line running east two miles from the initial corner, I was convinced that we were constantly losing in our measurement. I therefore, in order to facilitate our closing deemed it advisable to run eight full miles from the initial corner west before setting the northwest corner.

General Description.

This grant contains every grade of land from the most productive to the most sterile. La "Trois Tetons" and the Chatillon creeks have each rich bottom lands, from one-half of a mile to a mile in width, extending nearly to the mountains. About six miles from the mountains the bottoms rapidly widen until along the west boundary they become almost an unbroken savannah thickly covered with grass, red-top and other varieties, some of which is five feet in height.

The grant contains about forty thousand (40,000) acres which may be classed as 1st rate. The balance, excepting the sand hills in the southeast corner (about six square miles) and the extreme mountain portion (say ten square miles) is good grazing land; and between the Chatillon and Arenas creeks affords a rich growth of gramma grass.

The Chatillon leaves the mountains at a point nearly equidistant between the north and south boundary lines, and runs in a due westerly direction until it is lost in the savannah above mentioned. These creeks are timbered about five miles. There is considerable good pine near the base of the mountains, and firs higher up. Along the streams are cottonwoods (sweet cottonwoods) of considerable size. There is no stone except in the vicinity of the mountains. These are composed mainly of a dense and fine-grained granite varying to sienite and gneiss. Near their base is found a very compact conglomerate, parti-colored and presenting more than the beauties of the mosaic art. Saw fragments of limestone (jurassic) but none in position. Saw no indications of the precious metals or minerals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle set forth in the notes.

The general course of the mountains, from the Mosca pass is N. 32° W. and in the vicinity of the "Trois Tetons" and the Chatillon creeks, their elevation above the park is 6,300 feet.

List of Names.

A list of the names of the individuals employed to assist in running, measuring, and marking the lines and courses described in the foregoing field-notes of Grant No. 4 of the heirs of Luis Maria Baca, in the San Luis valley, Colorado Territory, showing the respective capacities in which they acted.

Robert Finley, chainman.
Milton Hadley, chainman.
James H. Woodworth, mound-builder.

We hereby certify that we assisted Albinus Z. Sheldon, deputy surveyor, in surveying the exterior boundaries of Grant No. 4 of the heirs of Luis Maria Baca, in the San Luis valley, Colorado Territory, and that said grant has been in all respects, to the best of their knowledge and belief, well and faithfully surveyed, and the boundary monuments planted according to the instructions furnished by the surveyor general.

ROBERT FINLEY, *Chainman.*
MILTON HADLEY.

Sworn to and subscribed before me this 28th day of November, A. D. 1863.

M. G. BRADFORD,
Clerk of Dist. Court, 2nd Judicial Dist.,
P'r GEORGE A. BUTE, *Dep-ty.*
JAMES H. WOODWORTH.

Sworn to and subscribed before me this 30th day of November, A. D. 1863.

M. G. BRADFORD,
P'r GEORGE A. BUTE, *Dep-ty.*

61 & 62 I, Albinus Z. Sheldon, deputy surveyor, do solemnly swear that, in pursuance of a contract with John Pearce, surveyor of the public lands of the United States, in the Territories of Colorado and Utah, bearing date the 7th day of October, A. D. 1863, and in strict conformity with the laws of the United States and the instructions furnished by the surveyor general, I have faithfully surveyed the exterior boundaries of Grant No. 4 of the heirs of Luis Maria Baca, in the San Luis valley, Colorado Territory, and do further solemnly swear that the foregoing are the true and original field-notes of said survey.

A. Z. SHELDON,
Deputy Surveyor.

Sworn to and subscribed before me, this twenty-eighth day of November, A. D. 1863.

M. G. BRADFORD,
Clerk of Dist. Court, 3rd Judicial Dist.,
P'r GEORGE A. BUTE, *Deputy.*

SURVEYOR GENERAL'S OFFICE,
DENVER, C. T., *March 15th*, 1864.

The foregoing field-notes of the survey of Grant No. 4, heirs of Luis Maria Baca, executed by Albinus Z. Sheldon, under his contract of the 7th day of October, 1863, having been critically examined, the necessary corrections and explanations made, the said field-notes and the survey they describe are hereby approved.

JOHN PIERCE,
Surveyor General of Colorado and Utah.

To the foregoing field-notes, and as a part of said Exhibit 6, was attached a certificate as follows, to wit:

GENERAL LAND OFFICE, *May 6th*, 1868.

I, Joseph S. Wilson, Commissioner of the General Land Office, do hereby certify that the annexed are true and literal exemplifications from the records of this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] JOS. S. WILSON,
Commissioner of the General Land Office.

(Here follows diagram marked p. 63.)

64 & 65 EXHIBIT No. 19.

SURVEYOR GENERAL'S OFFICE,
DENVER, C. T., *March 29th*, 1864.

SIR: I have the honor to acknowledge the receipt of your letter of Feb'y 26th, enclosing field-notes and papers in regard to the survey of Grant No. 4 of the heirs of Luis Maria Baca.

I herewith enclose transcript of field-notes & plat of said survey. I have furnished ex-Gov. Gilpin with one copy of the plat and retained one in the office.

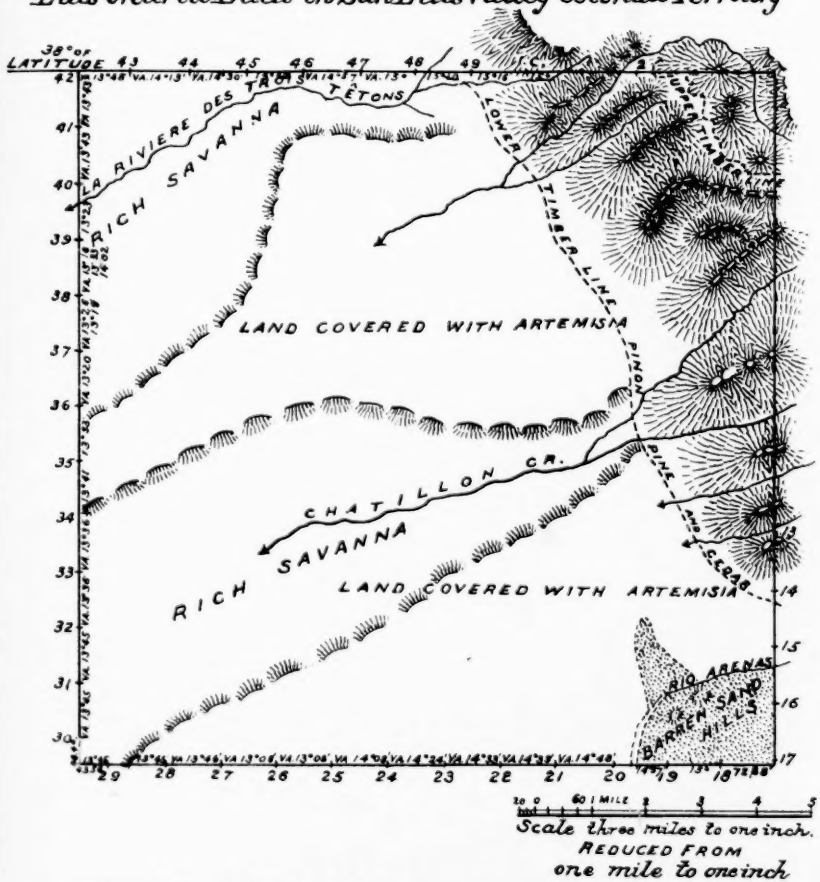
Very respectfully, your ob't serv't,

(Signed) JOHN PIERCE,
Surveyor General of Colorado & Utah.

Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C.

Ex. Nº 7.

MAP OF THE **SURVEY** OF **GRANT Nº4** OF THE HEIRS OF
Luis Maria Baca in San Luis Valley Colorado Territory



The above map of the boundary lines of Grant No. 4 of the heirs of Luis Maria Baca in San Luis Valley Colorado Territory, as surveyed by Albinus Z. Sheldon under his contract bearing date the 7th day of October 1863, is strictly conformable to the field notes on file in this office, which have been examined and approved, subject to the conditions and provisions of Sec. 6 of the act of Congress approved June 21st 1860.

Surveyor Generals Office JOHN PIERCE
Denver March 18th 1864 Sur. Genl. Colo. & Utah

No 157 By Quincy C. Shaw and Murray M. Kellogg } A 63

63

EXHIBIT No. 20.

GENERAL LAND OFFICE, *May 4th*, 1864.

John Pierce, Esq., surveyor general, Denver city, C. T.

SIR: Your letter of March 29th last, transmitting transcript & field-notes of the survey of Grant No. 4, of the heirs of Luis Maria Baca, has been received at this office.

Very respectfully, your ob't serv't,

(Signed) J. M. EDMUNDS,
Commissioner.

EXHIBIT No. 8.

Heirs of Luis Maria Baca
to
Tomas Cabeza de Baca.

Know all men by these, that we the undersigned heirs-at-law and legal representatives of Don Luis Maria Baca, deceased, have made, constituted and appointed, and do by these presents make, constitute and appoint, Don Tomas Cabeza de Baca of Pena Blanco, Santa Anna county, New Mexico, our true and lawful attorney for us and in our name to prosecute, attend to, and manage all
66 matters of business, relating to the interests of said heirs of Luis Maria Baca, to employ and pay (attorn*i*es) in such manner as may seem best, and we further authorize and empower our said attorney to make and execute, in our name, and for us, as our attorney-in-fact, a deed to John S. Watts, his heirs and assigns, for the lands granted to the said heirs of Luis Maria Baca under the 6th section of an act of Congress approved the 21" of June, 1860, described in locations No. 2, 3, 4, and upon the payment by said John S. Watts to the said Tomas Cabeza de Baca of the sum of five thousand dollars, we also authorize and empower him to make and execute a deed to said John S. Watts, his heirs or assigns for the lands described in location No. 5 on the Pecos river, or such other lands as may hereafter be located upon, in the place of said lands, should said location be ( ) after in conveyance of the same being included within the Apache and Navajo reservation, and we hereby ratify and confirm whatever contract, agreement or title the said Tomas Cabeza de Baca has or may make or execute in the premises and upon the confirmation of the grant made to Luis Maria Baca in favor of his heirs by Congress to the place called Ojo Esperete Lanto we also authorize and empower our said attorney to make and execute to John S. Watts, his heirs or assigns, a deed to his portion of said grant and the remaining portion to divide or sell and convey as may seem most conducive to the interest of said heirs of Luis Maria Baca and in our name as our attorney-in-fact, to execute any and all documents, papers and letters, necessary in the premises, and we hereby ratify and confirm whatever our said

attorney may do in the premises as fully as if done by us in our own proper persons.

Witness our hands and seals this 1st day of May, 1864.

DIEGO BACA. [SEAL.]
LUIS BACA. [SEAL.]
DOMINGO BACA. [SEAL.]
JESUS M. BACA, [SEAL.]

Purchaser of the Interest of Jesus Baca y Lusero 2°.

PRUDENCIA BACA. [SEAL.]
FELIPO BACA. [SEL-O.]
LUIS SELA ESPOSE SA JOSEFA BACA. [SEL-O.]
FOREPA BACA Y S^{a} HY. [SELLO.]
ME. ALLAVEACIA BACA. [SELLO.]
Por Rosa Baca y TOREPA SALAS. [SELLO.]
seis braderos por LUIS MA. BACA. [SELLO.]
Maces Baca. ALFONSO BACA. [SELLO.]
JESUS DE DIOS BACA. [SELLO.]
67 MARTIN BACA. [SELLO.]
JESUS BACA Y LUCERO 1ST. [SELLO.]
Por Jose Baca y Less CREDEROS JESUS BACA GALLEGOS. [SELLO.]
Por Juan Anto. Baca y sus CREDOES TOMAS C. DE BACA. [SELLO.]
ANTO. BACA,
Por LUVRA PAULE ANT^{o} GARCIA. [SELLO.]
FRAN. GARCIA. [SELLO.]
JESUS GARCIA. [SELLO.]
JUANO GARCIA. [SELLO.]
Por GUADULUPE BACA Y CREDEROS. [SELLO.]
ANTO. TRUJELLO. [SELLO.]

(Here follow certificates of acknowledgement and of record.)

EXHIBIT No. 9.

Luis Baca *et al.*
to
John S. Watts.

Know all men by these presents, that we Luis Baca, Prudencia Baca, Jesus Baca and Domingo, sons of Luis Maria Baca, residents of Pena Blanca, New Mexico, that we Josefa Baca y Lucero, wife of Luis de Luo and Altagracia Baca wife of Francisco Martinea, daughters of Luis Maria Baca, residents of Pena Blanca, New Mexico, in our own proper persons, and we either in our own persons or by our attorney-in-fact Tomas Baca, to wit, Jesus Baca, Tomas Baca, Encarnacion Baca wife of Manuel Viscario, Josefa Baca wife of Demetio de Lao, Jose Baca, Tomas Baca 2°, Trinidad Baca, wife of Fernando Delgado, Altragracia Baca wife of Patricio Silva, children of Juan Antonio Baca deceased, son of Luis Maria Baca, we Francisco Silva, Nabel Silva, wife of Vicente Armijo, Jesus Maria Silva,

Benito Silva, Valentin Silva and Manuel Silva, children of Cecaria Baca deceased, who was a daughter of Juan Antonio Baca deceased, we Isabel Baca wife of Jose Doroteo Sena, Daria Baca, Santiago Baca, Maria Baca, wife of Luis Maria Ortez, and Adelide Baca children of Domingo Baca deceased, son of Juan Antonio Baca, we Antonio Baca, Felipe Baca, wife of Jose Baca, Jesus Maria Baca, Fernando Baca, Josefa Baca, wife of Jesus Baca, Polonia Baca wife of Pedro Archilegne and Francisco Baca, children of Jose Baca de-
68 ceased, son of Luis Maria Baca, we Querino Baca, Diego Baca, Guadalupe Baca wife of Jesus Maria Leiba, Romaldo Baca, Martina Baca, and Paulina Baca, children of Miguel Baca deceased, son of Luis Maria Baca, we Luis Maria Baca, Alejandro Baca, Juan de Dios Baca and Martino Baca, children of Matio Baca deceased, we Antonio Trujillo, Maria Josefa Trujillo, wife of Cesario Ramirez, Andres Trujillo, Juan Trujello, children of Guadalupe Baca, daughter of Luis Maria Baca and wife of Santiago Trujillo, and we, Josefa Lopez wife of Nicolas Armijo and daughter of Feliciana Trujillo deceased daughter of Guadalupe Baca deceased, Marto Lopez son of said Feliciana Trujillo, Altagracia Lopez wife of Francisco Ramirez and daughter of said Feliciana Trujillo, Jesus Maria Trujillo son of Guadalupe Trujillo deceased, who was a daughter of Guadalupe Baca deceased, we Josefa Salas, wife of Jose Martinez, and daughter of Rosa Baca deceased, daughter of Luis Maria Baca, Dolores Baca, daughter of said Rosa Baca deceased, we Espendion Baca and Refugia Baca, children of Francisco Baca deceased, son of said Rosa Baca, we Josefa Baca y Sanchez daughter of Luis Maria Baca and wife of Juan Luis Montoya, we Antonio Garcia, Francisco Garcia, Maria Inez Garcia, Jesus Maria Garcia and Maria de las Angeles Garcia, children of Juana Baca deceased, daughter of Luis Maria Baca and wife of Jose Garcia, we Josefa Baca y Lucero, daughter of Luis Maria Baca and wife of Luis de Lao, we Altagracia Baca, daughter of Luis Maria Baca and wife of Francisco Martinez, I Tomas Cabeza de Baca owner of the interest and claim of Manuel Baca, son of Luis Maria Baca, to his intent as heir of Luis Maria Baca, as appears by deed of conveyance executed the 17th day of June, 1861, and duly recorded in the record books of the register of deeds for Santa Ana county, letter D, page- 6 & 7, and I Tomas Cabeza de Baca, owner of the interest of Ignacio Baca, only son and heir of Ramon Baca deceased, son of Luis Maria Baca, as appears by deed of said Ignacio Baca and Maria Guadalupe Hurtado, to said Tomas Cabeza de Baca, executed on the first day of June, 1861, and duly recorded in the Record Book D of Deeds for Santa Ana County, page- 5 & 6. I Jesus Maria Cabeza de Baca, owner by purchase of the interest of Jesus Baca y Lucero 1°, son of Luis Maria Baca, as appears by deed of said Jesus Baca y Lucero 1°, and Maria Rafaela Armijo his wife, executed the 20th day of August, 1861, and recorded in the Record Book Letter D, pag- 12 and 13 of the register of deeds for Santa Ana county, and I Francisco Baca, owner by purchase of the interest of Domingo Baca, son of Luis Maria Baca for and in consideration of the services of John S. Watts for many years in and about the business of said heirs of Luis Maria Baca, as the attorney of

said heirs, and for the further consideration of three thousand
69 dollars, paid by the said John S. Watts to Tomas Cabeza de Baca, our attorney-in-fact, have bargained, sold and conveyed, and by these presents bargain, sell and convey to the said John S. Watts of Santa Fé, New Mexico, and to his heirs and assigns forever, all our right, title, interest and claim in and to the following lands, located upon by us, as heirs of Luis Maria Baca, under the 6th section of an act of Congress approved June 21st, 1860, to wit: Location No. 2 situate on the Canadian or Red river in the Territory of New Mexico and described as follows, to wit: Beginning at the corner to sections 21, 22, 27 & 28 in township 13 north of the base line and range 29 east of New Mexico principal meridian, running from said initial point, north six miles, eighteen chains and twenty-two links, thence east twelve miles, thirty-six chains and forty-four links, thence west twelve miles, thirty-six chains and forty-four links, thence north six miles, eighteen chains and twenty-two links, to the place of beginning, containing ninety-nine thousand two hundred and eighty-nine acres, and thirty-nine hundredths of an acre, more or less; also section No. 3, situate in the Territory of Arizona, formerly in Donna Ana county, New Mexico, and described as follows, to wit: Commencing at a point one mile and a half from the base of the Salero mountain, in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and forty-four links, thence south twelve miles, thirty-six chains and forty-four links, thence east twelve miles, thirty-six chains and forty-four links, thence north twelve miles, thirty-six chains and forty-four links, to the place of beginning, containing ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre more or less. Also location No. 4, situate in Costilla county, Colorado Territory, formerly in Taos county, New Mexico, known and described as follows, to wit: Beginning at a point on the eastern edge of the San Luis valley, where the thirty-eighth degree of latitude crosses the dividing line of the plain and mountain, thence east along said parallel of latitude four and one-half miles, thence south at a right angle to said parallel of latitude twelve and one-half miles, thence west at a right angle twelve and one half miles, thence north at a right angle twelve and one-half miles, to the aforesaid parallel of latitude, thence east with said parallel of latitude eight miles to the place of beginning, containing ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre more or less.

To have and to hold the lands aforesaid with all the appurtenances and privileges to the same belonging, to the said John S.
70 Watts and his heirs forever, in fee-simple, and the said heirs of Luis Maria Baca in person and by their attorney-in-fact, Tomas Cabeza de Baca covenant with the said John S. Watts and his heirs, for themselves and their heirs as follows, to wit:

1. That they are seized in fee of the lands aforesaid and have good right and title to the same.

2. That said lands are free from encumberances, and that they have full power to sell and convey the same.

3. That the said John S. Watts and his heirs and assigns shall quietly enjoy said lands forever free from all claims or demands of the said heirs of Luis Maria Baca, their heirs, executors or administrators.

4. That we will defend and protect the title aforesaid against all claim or claims of title arising from or under us as heirs of said Luis Maria Baca, or under our heirs, executors and administrators.

5. That the said John S. Watts and his heirs and assigns shall forever enjoy the lands aforesaid in as full and ample a manner as the heirs of Luis Maria Baca held and enjoyed the said lands just before the execution of this conveyance.

In witness whereof we have hereunto set our hands and seals this 1st day of May, 1864.

(U. S. rev. stamp, $5.00.)

DIEGO BACA. [SELLO.]
LUIS BACA. [SELLO.]
DOMINGO BACA. [SELLO.]
JESUS MA. BACA, [SELLO.]
Purchaser of the Interest of Jesus Baca y Lucero 2°.
FELIPE BACA. [SELLO.]
LUIS DE LOS O'ESPERO DE JOSEFA BACA. [SELLO.]
JOSEFA BACA. [SELLO.]
MARIA ALTAGRACIA BACA. [SELLO.]
PRUDENCIO BACA. [SELLO.]
TOMAS BACA, [SELLO.]
Attorney-in-fact for the Heirs of Juan Antonio Baca.
TOMAS DE BACA, [SELLO.]
Attorney-in-fact for the Heirs of Jose Baca.
TOMAS DE BACA, [SELLO.]
Purchaser of the Interest of the Heirs of Ramon Baca.
TOMAS DE BACA, [SELLO.]
Attorney-in-fact of the Heirs of Mateo Baca.
71 TOMAS DE BACA, [SELLO.]
Attorney-in-fact for the Heirs of Jesus Baca y Lucero.
TOMAS DE BACA, [SELLO.]
Purchaser of the Interest of Manuel Baca.
TOMAS DE BACA, [SELLO.]
Attorney-in-fact for the Heirs of Guadalupe Baca.
TOMAS DE BACA, [SELLO.]
Attorney-in-fact for the Heirs of Rosa Baca.
TOMAS DE BACA, [SELLO.]
Attorney-in-fact for the Heirs of Josefa Baca y Sanchez.
TOMAS DE BACA, [SELLO.]
Attorney-in-fact for the Heirs of Juana Paula Baca.
JESUS MA. BACA, [SELLO.]
Purchaser of the Interest of Jesus Baca y Lucero 2°.
FRANCISCO MARTIN, ESPOSO DE MARIA ALTAGRACIA BACA. [SELLO.]

Executado y firmando en la presencia de Bernabé Baca y Altagracia Sanchez.

(Here follow certificates of (acknowledgement) and of record.)

Warranty Deed.

Heirs of Luis Maria Baca
to
John S. Watts.

Filed for record at 4½ o'clock p. m., Sept. 3d, 1875.
GEO. S. PARSONS, *Recorder.*

Know all men by these presents we, Quinna Baca of Santa Fé, New Mexico, Romaldo Baca of Las Vegas, New Mexico, Guadalupe Baca, wife of Jesus Maria Leiba and Jesus Maria Leiba, of Pena Blanca, New Mexico, Martino Baca of Las Vegas, New Mexico, and Paulina Baca of Santa Fé, New Mexico, children and heirs-at-law of Miguel Baca, deceased, a son and heir of Luis Maria Baca, deceased, for and in consideration of the services of John S. Watts as our attorney, have sold, bargained and conveyed and by these presents do (*well*), bargain and convey to the said John S. Watts and his heirs and assigns, forever, one-half of our interest claim and right in and to all the lands located upon under the 6th section of an act of Congress approved June 21", 1860, location No. 1, 2, 3, 4, & 5 having been made under said act each containing nine hundred and ninety-nine thousand 289.39 acres of land situate
72 in New Mexico as the boundaries of said Territory existed on the 21" of June 1860 and for and in consideration of one thousand dollars to us in hand paid by the said John S. Watts we have bargained, sold and conveyed, and do, by these presents, bargain, sell and convey unto the said John S. Watts and his heirs forever the remaining half of our interest, title and claim to the lands located upon under said 6th section of said act of Congress, said locations being described as follows, to wit: Location No. 1, beginning at a point in the Vallies Grandies called the Puerto de Tarmillo, running thence east six miles 18 chains and 22 links, thence north six miles 18 chains and 22 links, thence west twelve miles 36 chains and 44 links, thence south twelve miles 36 chains and 44 links, thence east twelve miles 36 chains and 44 links, thence north six miles 18 chains and 22 links.

Location No. 2 being described as follows, to wit: Beginning at the corner of sections 21, 22, 27 & 28 in township 13 north of the base line and range 29 east of New Mexico principal meridian as a beginning point, running thence north six miles eighteen chains and 22 links, thence east twelve miles 36 chains and 44 links; thence west twelve miles 36 chains and 44 links; thence north six miles 18 chains and 22 links to the place of beginning, containing ninety-nine thousand, two hundred and eighty-nine acres and thirty-nine hundredths of an acre.

Location No. 3 being described as follows, to wit: Beginning at a

point one mile and a half from the base of the Saleno mountains in a direction north 45° east of the highest point of said mountain, running thence west twelve miles, 36 chains and 44 links, thence south 12 miles 36 chains and 44 links, thence east 12 miles 36 chains and 44 links, thence north 12 miles 36 chains and 44 links to the place of beginning, containing 99,289.36 acres. Location No. 4 being described as follows, to wit:

Beginning at a point on the eastern edge of the San Luis valley where the 38° of latitude crosses the dividing line of the plain and mountain; thence east along said parallel of latitude four and one-half miles; thence south at right angle to said parallel of latitude, twelve and one-half miles; thence west at a right angle twelve and one-half miles; thence north at a right angle twelve and one-half miles; thence east with said parallel of latitude eight miles to the point of beginning, containing 99,289.39 acres more or less.

Location No. 5 being described as follows, to wit: Beginning at that point on the River Pecos where the reservation of Fort Sumner strikes the river above said fort and extending the line from
73 that point, so as to form a square above the reservation survey an equal distance on each side of the river for the southern line, containing 99,289.39 acres more or less.

To have and to — to the said John S. Watts and his heirs and assigns forever all our right, title, interest and claim in and to the lands aforesaid in as full and ample a manner as we had and held the same just before the execution of this deed.

In witness whereof, we have hereunto set our hands and seals this 1st day of May, 1864.

her
JUANNA x BACA. [L. S.]
mark.
GUADALUPE BACA. [SEAL.]
JESUS LEIVA. [SEAL.]
her
PAULENE x BACA. [SEAL.]
mark.
MARTINO C. DE x BACA. [SEAL.]
mark.
his
ROMALDO x BACA. [SEAL.]
mark.

Executado y Fermando en la presencia delos Testigos Bernabe Baca y Atanacios Sauchos.

Marm vixi Tafoyce Testigos. Testigos a la formado Martina Baca, Wm. Braden, Edwin J. Edgar.

(Here follow certificates of (acknowledgement) and of record.)

Mr. VAILE: "I would state to the court and counsel that a suit was brought by John S. Watts against William Gilpin, based upon a contract which is set out in the bill of complaint, relating to this title. In that suit a cross-bill was filed, as well as an answer, and the result of the proceeding, after pending some years, was a decree

to the effect that the interest of Mr. Watts, plaintiff in that action, and the defendant to the cross-bill therein, should be conveyed to William Gilpin, the defendant in the original action and complainant in the cross-bill. To show jurisdiction to enter the decree I suppose at least the filing of these papers should be shown, and unless counsel desires them to go into the record, I shall simply show the filing."

Mr. SMITH: "I think if counsel would offer the contract and the decree, and the evidence of its rendition, there would be no objection to it. It would serve all the purposes of the record."

Whereupon, counsel for plaintiff offered in evidence said agreement between John S. Watts and William Gilpin, incorpo-
74 rated as Exhibit "A" in the suit of John S. Watts against William Gilpin, commenced in the district court of Arapahoe county, Territory of Colorado, November 9th, 1869, being cause numbered 1771 of that court; said agreement being as follows:

Agreement between John S. Watts and William Gilpin.

Articles of agreement, sale, and transfer of certain property, real and personal, made this seventeenth day of February, A. D. 1862, between John S. Watts, of New Mexico, of the first part, and William Gilpin, of Colorado Territory, of the second part.

Whereas, by act of Congress of the United States, approved June 21st, 1860 entitled "An act to confirm certain private land claims in the Territory of New Mexico," in section 6 of the same, it is provided: "That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico, to make survey and location of the lands so selected by the said heirs of Baca, when thereunto required by them; provided, however, that the right hereby granted to the said heirs of Baca shall continue in force during three years from the passage of this act and no longer." And,

Whereas, the said John S. Watts, as agent and attorney for the heirs of Luis Maria Baca aforesaid, if fully empowered to make contract, sale and conveyance of the property, real and personal, of the heirs aforesaid, in the transfer and location of all or a portion of said five land grants or claims:

It is agreed between said John S. Watts, of the first part, and said William Gilpin, of the second part, as follows:

The said John S. Watts sells and conveys to the said William Gilpin, one of the said five grants or claims of land, estimated to contain one hundred thousand acres, for the sum of thirty cents per acre, payable in five equal annual instalments, (commenci-g) two years after the date of this sale and transfer; the said principal purchase-money to bear interest at five per centum per annum from the same

date, payable semi-annually, but the first payment of said interest to be paid simultaneously with the first instalment of principal aforesaid.

And the said John S. Watts, in consideration of the above payments and conditions, guarantees to the said William Gilpin
75 full transfer, possession and authority to locate said grant or claim of land, and further guarantees full conveyance and title in fee-simple to the lands, when the same shall be duly located, paid for and surveyed. And it is further agreed that, if at any time after the said location and survey shall be perfected, the full amount of purchase-money and interest shall be paid by the said William Gilpin, then the said John S. Watts shall make and perfect the conveyance and title to the said lands.

In testimony whereof we have hereunto set our hands and seals the day and year first above mentioned.

WILLIAM GILPIN. [SEAL.]
JOHN S. WATTS. [SEAL.]

Thereupon it was stipulated by and between the parties in open court that the contract just read in evidence was the subject of certain litigation between John S. Watts and William Gilpin, in the district court of Arapahoe county, Territory of Colorado, having jurisdiction of the parties and of the property in controversy, and resulted in a decree entered on the 3rd day of March, 1877.

Thereupon, the plaintiff, to further maintain the issues upon his part, offered in evidence the following other documents numbered and designated as exhibits in said cause, as follows, to wit:

EXHIBIT No. 10½.

STATE OF COLORADO, }
County of Arapahoe, } *ss.*:

District Court, Arapahoe County.

Pleas in the district court of the second judicial district of Colorado, sitting within and for the county of Arapahoe, before the Honorable Victor A. Elliott, judge, at a term thereof begun and held at the court-house, in the city of Denver, in said county, on the second Tuesday, it being the ninth day, of January, A. D. one thousand eight hundred and seventy-seven.

Present: The Honorable Victor A. Elliott, judge of said court; David B. Graham, Esquire, dist. att'y of said judicial dist.; David J. Cook, Esquire, sheriff of said county; Robert Chalfant, Esquire, clerk of said court.

76 Be it remembered, that heretofore, and on, to wit, the third day of March, A. D. 1877, the same being one of the regular juridical days of the January term, A. D. 1877, of said court, the following proceedings (*inter alia*) were had and entered of record in said court in a certain cause therein depending, to wit:

(Here follows the decree; and said decree being set out in full in the following Exhibit No. 11, it is here omitted.)

EXHIBIT No. 11.

Master's Deed.

Wm. B. Mills, master in chancery,
to
William Gilpin.

This indenture, made the sixth day of November, in the year of our Lord one thousand eight hundred and seventy-seven, between William B. Mills, one of the masters in chancery of the district court of the second judicial district of the State of Colorado, sitting within and for the county of Arapahoe, of the first part, and William Gilpin, of the said county of Arapahoe, of the second part:

Witnesseth: that whereas, at a term of the said district court, held for the said county of Arapahoe, at Denver, in said county, on the ninth day of January, in the year of our Lord one thousand eight hundred and seventy-seven, it was, among other things, ordered, adjudged and decreed by the said court, in a certain cause then depending in said court, between John S. Watts and Wilson Waddingham, complainants, and the said William Gilpin, defendant, in the words and figures following, to wit:

"JOHN S. WATTS and WILSON WADDINGHAM
"*vs.*
"WILLIAM GILPIN. } 1771. In Chancery.

"This cause now coming on to be heard, upon the original and supplemental bills filed herein, and the answers of the said defendant thereto, and upon the cross-bill of the said defendant and the answers thereto, and upon all the pleadings, proofs taken therein and the stipulations and agreements of the parties filed herein. And the counsel for the respective parties having been heard, and the court being fully advised in the premises, and it appearing to the court that a good title can be made by the said complainants to the premises comprised in the agreement between the parties to this cause, mentioned in the pleadings therein, and dated the 17th day of February, A. D. 1862.

"It is therefore ordered, adjudged and decreed, and this court does order, adjudge and decree that the said agreement, so
77 made and entered into between the said complainant John S. Watts and defendant, and subsequently transferred to said complainant Waddingham, together with the lands referred to therein and duly proved in this cause, be specifically performed. And it is further ordered, adjudged and decreed that the said complainants in the original and supplemental bills and the said defendants in the cross-bill in this cause, execute and deposit with the clerk of this court all proper, good and sufficient conveyances, in fee-simple, free from all incumbrances, including all taxes heretofore assessed on said land up to and including the year A. D. 1876, with covenants of warranty against all persons claiming by, through or

under the said complainant Waddingham, or his grantees, to be delivered to said defendant as hereinafter provided, for the premises described in the said agreement between the said Watts and Gilpin, and more particularly described as follows, to wit: Beginning at a point on the eastern edge of the San Luis valley, where the thirty-eighth degree of latitude crosses the dividing line of the plain and mountain; thence east along said parallel of latitude, four and one-half miles; thence south, at a right angle to said parallel of latitude, twelve and one-half miles; thence west, at a right angle, twelve and one-half miles; thence north at a right angle, twelve and one-half miles to the aforesaid parallel of latitude; thence east with said parallel of latitude eight miles to the place of beginning, containing ninety-nine thousand two hundred and eighty-nine acres and thirty-nine one-hundredths of an acre, the same being now situated in Saguache county and State of Colorado, said deeds of conveyance to be approved by this court in case the parties differ about the same. And it is further ordered, adjudged and decreed that, upon the filing of all such conveyances with the clerk of this court, to be delivered to the said defendant as hereinafter provided, the said defendant shall pay unto the said complainant, Wilson Waddingham, as the grantee of the said John S. Watts, or to the clerk of this court for his use, whose receipt therefor shall discharge the said defendant from any default herein, the sum of fifty-two thousand one hundred and eighty-four & $\frac{8}{100}$ dollars, being the full amount of principal and interest due on said agreement, up to the date of this decree, according to the tenor and effect thereof.

"And it is further ordered, adjudged and decreed that upon the filing with the clerk of this court proper and good & sufficient deeds of conveyance as hereinbefore provided for, the said defendant shall pay to the said complainant Waddingham, or to the clerk of
78 this court for his use, the sum of thirty thousand dollars as part and parcel of said principal sum before mentioned; that on or before the expiration of ninety days from the date of this decree, the said defendant, as another portion of said principal sum before mentioned, shall pay to the clerk of this court, or to Samuel G. Collins, Esqr., cashier of the Exchange Bank of Denver, the further sum of seventeen thousand five hundred and eighty-seven $\frac{5}{100}$ dollars, with interest on said last-mentioned sum at the rate of one & one-half per cent. per month from the date of this decree until the time of such payment, said last-mentioned sum being the amount of a certain deed of trust given by the said Wilson Waddingham to said Collins, as trustee, for the use of one Samuel Kelly dated September the 18th, A. D. 1875, at the time of which said last-mentioned payment the clerk of this court is directed and ordered to deliver to the said defendant the release deed of the said Collins to the said Waddingham, releasing said premises from said trust deed, and reconveying the same to said Waddingham, which said release deed is to be deposited with the clerk of this court to be delivered as aforesaid upon the making of said last-mentioned payment; that the balance of said sum first aforesaid mentioned, amounting to the sum of four thousand five hundred & ninety-seven $\frac{3}{100}$ dollars, is to be

paid to the clerk of this court, or to the said complainant Waddingham, or his agent, on or before the expiration of six months from the date of this decree, with interest on the same at the rate of ten per cent. per annum from the date of this decree until the same is paid; and it is further ordered, adjudged and decreed that, upon the payment of the last of said (instalments), as provided in this decree, the clerk of this court shall deliver to the said defendant the deeds of conveyance for the property described in this decree and hereinbefore provided to be filed with said clerk, together with all other deeds and title papers now in the possession of said Waddingham, and deposited with said clerk by him for that purpose. And it is further ordered, adjudged and decreed that, at the payment of the full amount of the contract price of said land as first mentioned in this decree, if the said complainant Watts has failed to execute & deposit with the clerk of this court a good, proper and sufficient deed conveying to said defendant all his right, title and interest in and to the premises described in the original and cross bills filed herein, according to the terms of said agreement, then upon the application of the said defendant, William B. Mills, Esqr., one of the masters in chancery of this court, is hereby authorized and empowered to make, execute and deliver to the said defendant a good and sufficient deed conveying to the said defendant all the
79 right, title and interest of said complainant Watts, in and to the premises before described.

"And it is further ordered, adjudged and decreed that, if the said defendant make default in the payment of the sum of money first provided for in this decree as the contract price of said land & the interest thereon, then and in such case the said contract is hereby cancelled and held for naught, and the said defendant is hereby foreclosed and forever barred from all equity in and to the same.

"And it is further ordered, adjudged and decreed that the said defendant pay the costs of this suit to be taxed by the clerk.

"(Signed) VICTOR A. ELLIOTT, *Judge, &c.*"

And whereas, the said defendant William Gilpin has fully paid each and every of the sums of money, so as aforesaid decreed to be paid by him, being the full amount of the contract price of said land and interest (thereof); and whereas, the said complainant, John S. Watts, has failed to execute and deposit with the clerk of said court, a good, proper and sufficient deed, conveying to the said defendant William Gilpin, all his right, title and interest in and to the premises described in the said original and cross bills filed in said cause, according to the terms of said agreement; and whereas, the said defendant William Gilpin has made application to me the said William B. Mills, master in chancery as aforesaid, for a good and sufficient deed conveying to him the said Gilpin, all the right, title and interest of said Watts, in and to the said lands as provided in and by said decree.

Now, therefore, I, William B. Mills, master in chancery as aforesaid, and party of the first part to these presents, in order to carry into effect and complete the provisions of said decree, and by virtue

of the statute in such cases made and provided and the power and authority in me vested by said decree, and in consideration of the premises and of the sum of ten dollars to me paid by the said William Gilpin, party of the second part, the receipt whereof is hereby acknowledged, have granted, conveyed and confirmed, and by these presents do grant, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, the following-described tract of land situated in the county of Saguache and State of Colorado, to wit:

Beginning at a point on the eastern edge of the San Luis valley, where the thirty-eighth degree of latitude crosses the dividing line of the plain and mountain; thence east along said parallel of latitude four and one-half miles; thence south, at a right angle
80 to said parallel of latitude, twelve and one-half miles; thence west, at a right angle, twelve and one-half miles; thence north, at a right angle, twelve and one-half miles, to the aforesaid parallel of latitude; thence east, with said parallel of latitude, eight miles, to the place of beginning; containing ninety-nine thousand and two hundred and eighty-nine acres, and thirty-nine one-hundredths of an acre; together with all and singular the right, title and interest of the said John S. Watts, and the privileges, hereditaments and appurtenances to the same belonging or in anywise appertaining.

To have and to hold the said premises above described and hereby intended to be granted and conveyed, unto the said party of the second part, his heirs and assigns, to his and their only proper use and benefit forever.

In witness whereof, I, the said party of the first part, master in chancery, as aforesaid, have hereunto set my hand and seal the day and year first above written.

WILLIAM B. MILLS. [SEAL.]
Master in Chancery.

STATE OF COLORADO, }
Arapahoe County, } ss:

On this sixth day of November, A. D. 1877, before me personally appeared William B. Mills, master in chancery, known to me to be the person described in, and who executed this indenture, and acknowledged that he executed the same for the uses and purposes therein mentioned.

Witness my hand and notarial seal this 6th day of November, 1877.

[SEAL.] LEVIN C. CHARLES,
Notary Public.

STATE OF COLORADO, }
County of Saguache, } ss:

This instrument was filed for record at 10 o'clock a. m., October 18th, 1879, and duly recorded in Book 5, page- 321, 322, 323, 324 & 325.

C. W. BALDWIN, *Recorder.*

Fees $7.00.
9—154

STATE OF COLORADO, } ss:
County of Saguache, }

I, T. J. Fitzpatrick, county clerk and *ex officio* recorder in and for the county in the State aforesaid, do hereby certify that the
81 above and foregoing is a true, correct, full and complete copy of a master's deed, William B. Mills, master in chancery, to William Gilpin, and of the whole thereof, as the same appears of record in my said office, and that the same was duly entered of record on the 18th day of Oct., A. D. 1879, at 10 o'clock a. m., in Book 5, on page 321, of the records of said county.

In testimony whereof I have hereunto set my hand and affixed my official seal at Saguache, this 30th day of June, A. D. 1892.

[SEAL.] T. J. FITZPATRICK,
County Clerk.

EXHIBIT No. 12.

Quitclaim Deed.

Wilson Waddingham
to
William Gilpin.

This deed, made this third day of March, in the year of our Lord, one thousand eight hundred and seventy-seven, between Wilson Waddingham, of the county of Arapahoe in the State of Colorado, of the first part, and William Gilpin, of the same place, of the second part:

Witnesseth: That the said party of the first part, for and in consideration of the sum of fifty-two thousand, one hundred and eighty-seven dollars and ninety-eight cents, to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath remised, released, sold, conveyed, and quitclaimed, and by these presents doth remise, release, sell, convey and quitclaim unto the said party of the second part, his heirs and assigns, (forever), all the right, title and interest, claim and demand, which the said party of the first part hath in and to the following-described real property, situate, lying and being in the county of Saguache and in the State of Colorado, namely:

Beginning at a point on the eastern edge of the San Luis valley where the thirty-eighth "38" degree of latitude crosses the dividing line of the plain and mountain; thence east along said parallel of latitude four and one-half miles "4½" miles; thence south, at a right angle to said parallel of latitude, twelve and one-half miles "12½;" thence west, at a right angle, twelve and one-half "12½" miles; thence north at a right angle twelve and one-half "12½" miles to the aforesaid parallel; thence east along said parallel of latitude
eight miles, to the place of beginning, containing ninety-nine
82 thousand two hundred and eighty-nine "99,289" acres and thirty-nine "$\frac{39}{100}$" one-hundredths of an acre more or ss, being location number four "3" in a deed from the heirs of Luis

Maria Baca to John S. Watts, bearing date the first day of May, 1864, recorded in volume "I," page three hundred and thirteen "313" etc., Costilla county records, in said State of Colorado.

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in anywise thereunto appertaining; and all the estate, right, title, interest and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

And the said party of the first part, against any and all taxes heretofore assessed up to and including the year A. D. 1876, upon said above-described property, as well also against any act or thing done by said first party incumbering, conveying or clouding in any way the title thereto, or any grantee of him, will warrant and forever defend by these presents.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first hereinabove written.

WILSON WADDINGHAM. [L. S.]

(Here follow certificates of (acknowledgement) and of record.)

EXHIBIT No. 13.

William Gilpin
to
George H. Adams.

This deed of indenture, made this tenth day of December, in the year of our Lord one thousand eight hundred and eighty-five, between William Gilpin, of the city of Denver, county of Arapahoe and State of Colorado, party of the first part, and George H. Adams, of the county of Saguache, in the said State of Colorado, party of the second part.

Witnesseth, that the party of the first part, for and in consideration of the sum of two hundred thousand dollars, to the said party of the first part in hand paid by the said party of the second part, has granted, bargained, sold and conveyed and by these presents, doth grant, bargain, sell and convey, unto the said party of
83 the second part, his heirs and assigns forever, all the following parcel or tract of land situated in the county of Saguache, in said State of Colorado, to wit:

All that certain piece, parcel and tract of land, with the buildings and improvements thereon situated, in the county of Saguache and State of Colorado aforesaid, containing ninety-nine thousand two hundred and eighty-nine and thirty-nine one-hundredths (99,289.39) acres of land more or less, and more particularly described by metes and bounds as follows, to wit: Beginning at a point on the eastern edge of the San Luis valley where the thirty-eight (38) degree of north latitude crosses the dividing line of the plain and mountain; thence east along said parallel of latitude four and one-half miles; thence south at a right angle to said parallel of latitude twelve and

one-half miles; thence west at a right angle twelve and one-half miles; thence north at a right angle twelve and one-half miles to the aforesaid parallel of latitude; thence east with said parallel of latitude eight miles to the place of beginning, as surveyed by the surveyor general of Colorado, and as appears by his field-notes now on file in the office of the said surveyor general of the State of Colorado aforesaid, which said parcel, piece and tract of land so as aforesaid by metes and bounds described is commonly known as and called the "Baca Grant No. 4" located under and by virtue of an act of Congress approved on the twenty-first day of June in the year of our Lord one thousand eight hundred and sixty, in and by which the said heirs of Luis Maria Baca were authorized to locate the said above-described lot and parcel of land.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim and demand, whatsoever, of the said party of the first part, either in law or equity, of, in or to the above bargained premises, with the hereditaments and appurtenances included herein, all and singular the lodes hereinafter mentioned and the royalties, considerations and benefits accruing and hereafter to accrue therefrom, to the party of the first part his heirs and legal representatives and assigns.

To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part his heirs and assigns forever. Provided always nevertheless, that this deed of conveyance is signed, sealed, executed and
84 delivered, subject to the terms, covenants and conditions contained in a certain indenture of lease made by the party of the first part to said party of the second part his heirs and assigns for the period of ten years, commencing the eighth day of November, 1878, and subject to all taxes on said property; the party of the second part assuming the same, and subject also to the terms, covenants and liabilities of a certain indenture of lease, executed and delivered by the said party of the first part on the twenty-fourth day of January, A. D. 1883, to the San Luis Gold Mining and Milling Company, a corporation duly organized under the laws of the State of Colorado, and conveying a leasehold interest for and during the full term of ninety (90) years, in a certain mining property commonly known as "The Eastern Star lode" and the "Gold Legion mine," for a certain good and valuable consideration, more particularly set forth in the said lease and which said indenture of lease is recorded in the office of the clerk and recorder of the county of Saguache aforesaid to which reference is hereby made for greater certainty. And further provided always nevertheless and it is the true intent and meaning of these presents, that this deed of conveyance is made, signed, sealed, executed and delivered, in every respect and in all of its parts and provisions, subject always to the terms and conditions of any and all other leases at any time heretofore made by the said party of the first part to any party or parties whomsoever, and now in force releasing and conveying any interest of the

said party of the first part in or to any mines or mining claims and mining property, situated within or upon the above-bargained premises; it being hereby distinctly understood and agreed that the said party of the first part does hereby convey and assign to the said party of the second part, his heirs and assigns, under and by virtue of this deed of conveyance, all right, title, interest and claim and demand in and to all royalties, considerations, rents, profits connected with or arising from or out of any and all such mining leases hereinbefore mentioned; and the said William Gilpin, party of the first part, for himself, his heirs, executors and administrators, does covenant and agree, to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents, he is well seized of the premises above conveyed, as and of a good, sure, perfect, absolute and indefeasible estate of inheritance in law in fee-simple, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the same are clear and free of all other grants, bargains, sales (*leins*), taxes, assessments and incumbrances of whatever kind and nature soever, and the
85 above-bargained premises in the quiet and peaceful possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, I, the said William Gilpin, party of the first part as aforesaid, shall and will warrant and forever defend.

Provided always that this covenant of warranty is intended and is expressly written herein to warrant and defend the title and peaceful possession of the above-described piece, parcel and tract of land with the buildings and improvements thereon unto the said party of the second part, his heirs and assigns as aforesaid, subject nevertheless in all respects to the leases and other instruments of writing obligatory here and before mentioned and referred to, as transferring to certain parties therein stated certain leasehold interests for a term of years of, in and to certain parts and parcels of the said described tract of land with the privileges and appurtenances thereunto in anywise belonging or appertaining according to the terms and tenor of said lease and instrument of writing as aforesaid.

In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

WILLIAM GILPIN. [SEAL.]

STATE OF COLORADO, }
County of Arapahoe, } ss:

I, E. A. Clark, a notary public duly appointed and commissioned in and for the county and State aforesaid, do hereby certify that William Gilpin who is personally known to me as the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 10th day of December, A. D. 1885.

[SEAL.] E. A. CLARK,
Notary Public.

EXHIBIT No. 14.

Deed of Conveyance.

Geo. H. Adams to Quincy A. Shaw. } No. 13989.

This deed of indenture made this fifteenth day of March, in the year of our Lord one thousand eight hundred and eighty-
86 seven, between George H. Adams, of the county of Saguache and State of Colorado, party of the first part, and Quincy A. Shaw, of Boston, in the county of Suffolk and State of Massachusetts, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one thousand dollars and other good and valuable considerations, to the said party of the first part in hand paid by the said party of the second part, has granted, bargained, sold and conveyed, and by these presents doth grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns forever, all the following-described parcel or tract of land situate in the county of Saguache, in said State of Colorado, to wit: all that certain piece, parcel and tract of land, with the buildings and improvements thereon, situate in the county of Saguache and State of Colorado aforesaid, containing ninety-nine thousand two hundred and eighty-nine and thirty-nine one-hundredths acres more or less, and more (particularly) described by metes and bounds as follows to wit: Beginning at a point on the eastern edge of the San Luis valley, where the thirty-eighth degree of north latitude crosses the dividing line of the plain and mountain; thence east along said parallel of latitude four and one-half miles; thence south at a right angle to said parallel of latitude twelve and one-half miles; thence west at a right angle twelve and one-half miles; thence north at a right angle twelve and one-half miles, to the aforesaid parallel of latitude; thence east with said parallel of latitude eight miles to the place of beginning, as surveyed by the surveyor general of Colorado and as appears by his field-notes now on file in the office of the said surveyor general of the State of Colorado aforesaid, which said parcel, piece and tract of land so as aforesaid by metes and bounds described, is commonly known as and called the "Baca Grant No. 4" located under and by virtue of an act of Congress approved on the twenty-first day of June in the year of our Lord one thousand eight hundred and sixty in and by which the heirs of Luis Maria Baca were authorized to locate the said above-described lot and parcel of land; together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all

the estate, right, title, interest, claim and demand whatsoever of the said party of the first part, either in law or equity, of, in or to the above-bargained premises, with the hereditaments and appurtenances included herein all and singular the lodes hereinafter mentioned, and the royalties, considerations and benefits accruing and hereafter to accrue therefrom, to the party of the first part, his heirs and legal representatives and assigns. To have and to hold the said prem-
87 ises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns forever. Provided always nevertheless, that this deed of conveyance is signed sealed, executed and delivered subject to the terms, covenants, and conditions contained in a certain indenture of lease made by William Gilpin to said George H. Adams and his heirs and assigns, for the period of ten years commencing the eighth day of November, 1878, and subject also to the terms, covenants and liabilities of a certain indenture of lease executed and delivered by the said William Gilpin on the twenty-fourth day of January, A. D. 1883, to the San Luis Gold Mining and Milling Company, a corporation duly organized under the laws of the State of Colorado, and conveying a leasehold interest for and during the full term of ninety years, in a certain mining property commonly known as "the Eastern Star lode" and the "Gold Legion mine," for a certain good and valuable consideration, more particularly set forth in the said lease, and which said indenture of lease is recorded in the office of the clerk and recorder of the county of Saguache aforesaid, to which reference is hereby made for greater certainty; and further provided always nevertheless, and it is the true intent and meaning of these presents that this deed of conveyance is made, signed, sealed, executed and delivered in every respect and in all of its parts and provisions, subject always to the terms and conditions of any and all other leases at any time heretofore made by the said party of the first part to any party or parties whomsoever, and now in force, releasing and conveying any interest of the said party of the first part, in or to any mines or mining claims and mining property situate within or upon the above-bargained premises, it being hereby distinctly understood and agreed, that the said party of the first part doth hereby convey and assign to the said party of the second —, his heirs and assigns, under and by virtue of this deed of conveyance, all right, title, interest and claim and demand in and to all royalties, considerations, rents, profits, connected with or arising from or out of any and all such mining leases hereinbefore mentioned, and the said George H. Adams, party of the first part, for himself, his heirs, executors and administrators, does covenant and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed as and of a good, sure, perfect, absolute and indefeasible estate of inheritance in law in fee-simple and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the same are free and clear of all other

grants, bargains, sales, liens, taxes, assessments and incum-
88 brances of whatever kind and nature soever. And the above-bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, I, the said George H. Adams, party of the first part as aforesaid, shall and will warrant and forever defend; provided always that this covenant of warranty is intended and is expressly written herein, to warrant and defend the title and peaceable possession of the above-described piece, parcel and tract of land with the buildings and improvements thereon unto the said party of the second part, his heirs and assigns as aforesaid, subject nevertheless in all respects to the leases and other instruments of writing obligatory hereinbefore mentioned and referred to, as transferring to certain parties herein stated certain leasehold interests for a term of years of, in and to certain parts and parcels of the said described tract of land with the privileges and appurtenances thereunto in anywise belonging or appertaining, according to the terms and tenor of said lease and instrument of writing as aforesaid.

In witness whereof, the said party of the first part hath hereunto set his hand and seal, the day and year first above written.

[SEAL.] GEORGE H. ADAMS.

Signed and sealed in presence of—
CHAS. HALL ADAMS.

(Here follow certificates of (acknowledgement) and of record.)

It was thereupon stipulated by and between the parties to this cause, in open court, that the land described in the complaint as being in the possession of the defendant, and for the recovery of which this suit is brought, is within the outer boundaries of Baca Grant No. 4, and is near the place known as Sangre de Cristo, near the bank of Cottonwood creek, and that the same is called by the defendant the Eastern Star mine.

TUESDAY, *May* 21, 1895.

To further maintain the issues on his part, the plaintiff introduced oral testimony as follows:

GEORGE H. ADAMS, a witness on the part of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. VAILE:

Q. Mr. Adams, state your name to the court and jury.
A. George H. Adams.
89 Q. Mr. Adams, where do you live?
A. Crestone.
Q. Do you live on Baca Grant No. 4?
A. I do.

Q. In what county?
A. Saguache county.
Q. How long have you lived there or in that vicinity?
A. Since 1869.
Q. Are you at present in charge of the Baca Grant No. 4?
A. I am.
Q. Do you know the defendant, Murry M. Kellogg?
A. I do.
Q. Are you acquainted with and do you know the locality of that property of which he has taken possession, and is now occupying, which he calls the Eastern Star mine?
A. I do.
Q. You may state to the jury whether or not Baca Grant No. 4 has for purposes of convenience in description and use been subdivided by lines running through it north and south, east and west?
A. Yes, sir; it has been sectionized.
Q. In the numbered sections inside of the grant, then, you may state in what one of them this Eastern Star mine, so called, is situated?
A. It is situated in the northeast quarter of section 22, township one (1) north, one (1) east.
Q. Are you the grantee, George H. Adams, mentioned in the deed from William Gilpin?
A. Yes, sir.
Q. In that deed and in a subsequent deed shortly afterwards made from yourself to Quincy A. Shaw, there is a reservation of a lease of property called the Eastern Star lode and the Gold Legion mine, the lease being to a company called the San Luis Gold Mining and Milling Company; state whether or not that company continued in possession for any length of time of this property under that lease?

By Mr. SMITH: I object, if your honor please——
The COURT: He may ask the question.
Mr. SMITH: We save an exception.

A. They did not.
Q. What became of the property so far as their occupancy and possession of it was concerned?
A. They turned it over to me.
Q. During the period of their occupancy was there any mill erected upon the property at that time?
90 A. There was a mill there, and they repaired it and added some machinery to it, and after that turned it over to the company—to me, rather.
Q. What was done with the mill and machinery after they turned over the property to you?
A. It was leased to other parties.
Q. Was it at any time dismantled, and the machinery taken away?
A. Yes.
Q. By whom?

A. By Mr Kellogg.

Q. Well, prior to that time?

A. No, sir: it was not dismantled by Mr. Kellogg.

Q. But by you after the surrender of the property under this lease to this company, was any of the machinery taken away by the owner of the grant?

A. Yes, sir.

Q. That is what I am now referring to; the other is a subsequent matter.

A. When we dismantled it we took out all the parts that were liable to be stolen and took it down to the ranch.

Q. That is to your home ranch?

A. Yes, sir.

Q. That is not far from the initial corner, is it?

A. About two miles, or a mile and a half west.

Q. Near the north side of the grant?

A. Yes, sir.

Q. After the property had thus been surrendered to the owners of the grant and machinery to a certain extent taken away from the mill, did you have any conversation with Mr. Kellogg concerning a lease of this property?

A. I did.

Q. You may state whether or not any lease, verbal or otherwise, was made to him at the time for this property?

A. I gave him a verbal lease for three months, I think in 1887.

Q. When did it expire?

A. In December, 1887.

Q. For the purpose of his occupancy you may state what was done in reference to this milling machinery which you had previously taken away from the premises?

A. Well, after he had worked the mine a little while he wanted to use the mill, and I gave him permission to use it and I hauled parts of the machinery that was at the ranch up to the mill for him. He had it there for something like two months. He promised if I would loan him this machinery he would return it in as
91 good order as I gave it to him. In about two or three months I heard he had left the country and the mill, and everything, and parties were stealing the machinery.

Q. Strangers were stealing the machinery?

A. Strangers, yes, sir.

Q. What did you do then?

A. I sent the men up and dismantled the mill again, and brought what parts could be stolen, or liable to be stolen, back to the home ranch again.

Q. Mr. Adams, you may state whether, after the removal of this property by you, and after the expiration of the verbal lease you had given Mr. Kellogg, he subsequently made an application to you for a lease of this property.

Mr. SMITH: I object to that as incompetent and immaterial.

The COURT: I think he may ask it.

A. He did the following spring.

Q. State whether it was granted or refused.

A. I refused it.

Q. After the refusal of the lease to Mr. Kellogg, you may state whether or not Mr. Kellogg took possession of this property.

A. He did take possession and locked up the mine; and in the meantime the machinery and mill had been burned down.

Q. You may state whether or not that possession which he took after you refused to give him a lease is the possession of which you are now complaining.

A. Yes, sir; which he is now claiming.

Q. You may state in what respect, if any, the occupancy by Mr. Kellogg has interfered with the use of the property and its occupation by the owner of the grant.

A. There was a damage to the cattle interest. It is just at the mouth of the gulch, and our cattle could not get up there within a mile or two of the mouth of the gulch to feed up in the gulch; and then again, they diverted the water, and it was thrown out on the sand and did not return into the stream again; and he cut timber for mining purposes; and going backward and forward over the ground—he seemed to have his own way there.

Q. You may state whether or not the owners of the grant suffered pecuniary damages by reason of this occupancy by Mr. Kellogg.

A. They did; and there was a damage when he encouraged others to take up mines on the grant.

Mr. SMITH: I move to strike that out.

92 Mr. VAILE: Wait a minute; you need not go into that subject at present.

Q. How much in your judgment, was the damage to the owners of the grant from the time of Mr. Kellogg taking possession to the beginning of this suit, by reason of the deprivation of the owners of the grant of the use of the property in connection with cattle grazing?

A. I think during the period there was a damage of four or five thousand dollars at least; we could not occupy that country; could not graze on it; it was a considerable damage to the hay interest where the water was diverted; thrown out into the sand and seeped away; did not go in its natural stream where we could use it from the ditches.

Q. What is your judgment of that damage?

A. It is hard to figure; it was several thousand dollars, for we have not cut any hay on that but once,—last year,—for several years.

Q. Mr. Adams, I understood you to say that you had lived upon this property or in its immediate vicinity since 1869; how long have you been connected with Baca Grant No. 4, either as a tenant, manager or owner, in all those capacities, what period of time will it cover?

A. Since 1874. I was employed from 1870 to 1874 at times there.

Q. That is to say you were an employé at times for that period

from 1870 to 1874, and since that time you have lived upon the ranch?

A. Yes, sir; been lessee, owner and manager.

Q. Your present position is that of manager for Mr. Shaw?

A. Yes, sir.

Q. You have already stated you were at one time the owner under deed from Mr. Gilpin?

A. Yes, sir.

Q. You may state how far back you are familiar with the fact, of the occupancy, if it be a fact, of this property by the owners of the grant.

A. Since 1869.

Q. You may state whether the grant itself has been in continuous occupation of the owners of the grant, personally, or by their employés and tenants from 1869 down to the present time.

A. It has.

Q. Were the outer boundaries of this grant marked in any way by monuments when you first became acquainted with it?

A. They were.

Q. What was the nature of these monuments when you first became acquainted with the grant?

93 A. At each half mile there was a stake set upright, a mound built and a post set.

Q. Over what portion of the outer boundaries of the grant did these monuments exist?

A. Well, on the west and south and the eastern portion of the survey there were stakes and posts, as I have described, and on the north side there were stakes and rocks.

Q. Well, how much of the north part was so marked?

A. The whole of the north line.

Q. The whole of the north line?

A. The whole of the north line marked with rocks.

Q. To the northeast corner?

A. No, as near as surveyed at the time.

Q. How many miles of it?

A. Ten miles.

Q. From the northwest corner ten miles east?

A. Yes, sir.

Q. How much of the east line was so marked and designated in 1869?

A. Four miles.

Q. That is, from the southeasterly corner north?

A. Yes, sir.

Q. And the entire south line?

A. Yes, sir.

Q. And the entire west line?

A. Yes, sir.

Q. You may state whether or not at any time this grant was fenced in?

A. It was.

Q. When was that done?

A. In 1881.
Q. Who built the fence?
A. I did.
Q. How much of the grant was thus fenced?
A. It was fenced from a mile and a half east of the initial corner.
Q. That is in the mountains?
A. That is in the mountains, around to——
Q. (Interrupting.) Around in what direction? Follow the direction.
A. West to the northwest corner, then south to the southwest corner, then east to the southeast corner, then north a little over four miles, a little beyond the thirteen-mile post.
Q. To get into the mountains again?
A. Yes, sir.
Q. The only part then that was not fenced, as I understand you, was the mountainous portion in the northeast corner?
A. Yes, sir.
94 Q. You may state whether or not during the period of your connection with this grant, from 1874 down, the grant has been paying taxes regularly to the State and county.
A. It has.

Mr. SMITH: We object to that, if your honor please, as not material; and a man does not pay taxes verbally.
The COURT: I think he may ask him the question.

Q. Mr. Adams, while you are upon the witness stand, I will call your attention to certain photographs: and first, as these will come in as exhibits I will mark them as Exhibits 15 and 16. Now, I will call your attention to the photograph which is marked Exhibit 15, and will ask you to state what it is.
A. This is a view taken in 1887 of the North Crestone creek, or really the north line of the grant.
Q. You may state whether or not the northeastern portion, the mountainous portion along the northern boundary of the grant, and near the northeast corner, is shown upon that photograph.
A. It is.
Q. Please state whether the rise of the mountains from the adjacent plain is shown in that vicinity.
A. It is; yes, sir.
Q. You may state whether this photograph covers that portion of the line on which the initial corner is situated.
A. Yes, sir.
Q. I see a light pencil-mark drawn upon the photograph; by whom was that drawn?
A. It was drawn by myself.
Q. Please state what you intended it for, this light pencil-mark.
A. To show the north line of the grant from the initial corner, and where the line goes over the summit of the range.
Q. From about what position was the photograph taken?
A. It was taken about seven miles west of the initial corner.

Q. How near the north boundary of the grant was the instrument, can you tell?

A. Just about a mile south of the north line.

Q. You may state when this photograph was taken.

A. In 1866, or 1887; 1886, I think.

Q. Was it taken for any purpose connected with this suit?

A. No, sir; it was taken to help a sale; that is to make out papers for a sale at the time.

Q. Illustrating the grant?

A. Yes, sir.

Whereupon counsel for plaintiff offered in evidence the photograph marked Exhibit 15, which was received without ob-
95 jection; and the same is included in the order of certification hereinafter set out.

Q. Now, I will call your attention to the photograph which I have marked as Exhibit 16, and I will ask you to state what that photograph represents?

Mr. SMITH: If the court please, before counsel proceeds with further examination upon this line, I desire to ask what the purpose of this examination is; if it be to establish or tend to establish the definiteness of the original selection made by Watts in 1862 as containing a definite point of description, I desire to object to it as being immaterial, and to object to all the testimony of this class, for the reason that the construction of that selection is a matter of law for the court, and not a question of fact for the jury. The definiteness of the original description.

The COURT: We will have to regard it as a question of fact for the jury; and in that view the photographs may be used.

A. This represents a view of the home ranch from the south looking north.

Q. Does it also show the relation of the mountains to the valley?

A. It does.

Q. In what direction are those mountains from the immediate vicinity of the grant?

A. They are east: that is, it shows looking east.

Q. Is it not northeast, Mr. Adams?

A. Yes, sir.

Q. In other words, the great bulk of the range as shown here is north of the line of the grant?

A. Yes, north of the line of the grant.

Q. What is the direction in which this view is taken?

A. Looking north, a little northeast.

Q. I will ask you if a line should be drawn east and west through a point a mile north of the grant and parallel to this north boundary, would the place where that line would strike the mountains be shown in this photograph?

A. It would.

Q. It is not marked in any way here?

A. No, sir.

Q. Can you indicate, however, by description in reference to the photograph about where it would strike the mountains?

A. I can.

Q. Where would it be?

A. A little south of the North Crestone cañon, probably a half a mile, or not quite a half a mile south.

96 Q. Then would it be at the right-hand side of the photograph and be halfway between its margin and where the cañon is shown on the photograph?

A. Yes, sir.

Q. Now, Mr. Adams, you have made the expression "home ranch" in your answers; what do you mean by "home ranch"?

A. It is the ranch where we have always lived; there are six or eight camps along on the place—shed camps, cattle camps & so on.

Q. Cattle camps?

A. Yes, sir.

Q. But the home ranch is where the family lives?

A. Where the family lives; where we always have lived.

Q. How long has this home ranch been so occupied?

A. Since I have been there it has been the home ranch.

Q. Since 1869 or 1870?

A. Yes, sir.

Q. Counsel have called attention to the consideration named in the deed from yourself to Mr. Shaw as being one thousand dollars, and other good and valuable considerations. I will ask you to state what was in fact the consideration which moved from Mr. Shaw to yourself?

A. Two hundred and fifty thousand dollars.

Q. What is the ranch used for; this Baca Grant No. 4?

A. Cattle-raising.

Q. Has it always been so used?

A. Yes, sir; cattle and hay.

Q. Where do you get your supply of water?

A. From the creeks; from the streams.

Q. Coming from where?

A. From the Sangre de Cristo range.

Q. From these mountains on the northeast corner?

A. Yes, sir.

Q. Are there various streams entering the range near the northeast corner?

A. Two.

Q. What are they?

A. North and South Crestone and Willow creek is a little further southeast.

Q. All those enter near the northeast corner, do they not?

A. Yes, sir.

Cross-examination.

By Mr. SMITH:

Q. Mr. Adams, you were asked with respect to the surrender of

the lease which was made upon the Eastern Star mine and the Gold Legion; how was that effected?

97 A. How was it turned over?

Q. Yes.

A. They turned over all their stock of the company to Governor Gilpin and turned the machinery and everything else over to me.

Q. Did Governor Gilpin make any further transfer of the property, of the lease, any further assignment of it?

A. He did; he turned over the stock and the company turned over the machinery.

Q. When, if at any time, did you become the owner of the lease?

A. In 1885.

Q. By what kind of an instrument?

A. It was a deed.

Q. Is this deed which has been offered here the only evidence of your title to that interest in the Eastern Star mine?

A. The stock of the Gold Legion Mining Company that has been turned over and assigned to Mr. Shaw, and he has it now.

Q. This deed, however, is the only evidence you have of any kind?

A. Yes, sir.

Q. There never was any formal assignment of that lease to you; who did that lease run to?

A. It ran to the Gold Legion Mining Company.

Q. Who was the other party to the lease?

A. Governor Gilpin.

Q. When, if at any time, did Governor Gilpin ever transfer that lease to you?

A. He never transferred it to me because they threw it up before the deed was completed.

Q. How long have you known the Eastern Star mine?

A. I have known it under different names since they first commenced to mine there.

Q. Who did you first know as being in possession of the Eastern Star mine?

A. Mr. Herard.

Q. When was that?

A. 1877 or 1878; 1877 I think it was.

Q. Was Mr. Herard there in possession with your knowledge and consent; were you then the owner of this grant?

A. No, sir.

Q. Were you in charge of this grant?

A. I was.

Q. Was he there at that time with your permission?

A. No, sir; we warned them all off after we found out where the eastern line was.

Q. What was he doing there in 1878?

98 A. He was not there in 1878; he went there in 1877, and I think he moved off in 1877; he had a ranch and a few cattle, and mining, dairying, &c.

Q. What was he doing in respect to the Eastern Star mine?

A. Occasionally mining it; there was a very little mining done. There was a prospect hole. He was trying to sell it.

Q. He was working on it as a mine; what did he have, a shaft?

A. A shaft, not very deep.

Q. Any tunnels?

A. I think he did towards the last. Mr. Herard gave up the property, turned it over to us when he moved from there; he had no claims on it at all; when he found that he was on the grant, he moved to a point where he supposed he was off the grant, and did not know he was on the grant until 1880, and until I had a surveyor go around and show me the lines and found he was; and then he moved three-quarters of a mile outside the grant.

Q. Are you speaking of the place where he lived or where he was mining?

A. He moved from the mine to get off the grant, did not want anything more to do with it if it was on the grant, and if the mine was claimed by the grant he would throw it up.

Q. He could not sell because you claimed it was on the grant?

A. Yes, sir.

Q. You say it was 1880 before he found he was on the grant?

A. No, sir; he found it out in 1876 and 1877 at Cottonwood, then he moved around to where he supposed he was off the grant, and then he did not find he was on the grant until 1880.

Q. I am only asking you with reference to the mine; it does not matter where he lived; it is not necessary to complicate the matter by telling where Mr. Herard lived at those times; limit yourself to the mine; when did he first find he was on that northeast corner?

A. In 1877, I think.

Q. How did he ascertain that?

A. There was a committee of miners from Cottonwood, and some of my men chained the distance from the west line from some stakes on the west side of the grant to the Sangre de Cristo.

Q. Prior to that time this grant had never been surveyed on that northeast corner?

A. No, sir.

99 Q. There had been two miles left unsurveyed from a point two miles east of the I. C. corner around to six miles above the southeast corner?

A. Yes, sir.

Q. In other words, the entire northeast corner of the grant was open and unsurveyed?

A. Yes, sir.

Q. And these miners, nor anybody else, could tell where that line was?

A. Yes, sir; they could tell, for some of them went down and sighted from stakes to the northeast corner, and they knew that they were two miles or two miles and a half inside of the grant, at Cottonwood in the Sangre de Cristo.

Q. But they had to make some kind of a survey for themselves to find it out; it was not marked on the grant in any way?

A. No, sir.

Q. When did you first know Mr. Kellogg in connection with that property?

A. In 1886, I think it was; 1886 or 1887.

Q. Did he ever at any time have any connection with this lease of the Eastern Star mine as mentioned in your deed?

A. No, sir.

Q. You say you had some talk with him about making him a new lease; was he in possession of the mine or working it at the time you had that conversation?

A. Yes, he had been in possession of it, but threw it up, as I stated awhile ago, and left the machinery and left everything, left the country, claimed he could not make it pay—at least, that is what I understood he said; I did not see anything of him after he left; went away and left the machinery all in the mill, and I had to send men up there and get it back.

Q. Who owned the mill?

A. It belonged to the grant.

Q. When did they buy it?

A. It was turned over through the Gold Legion Company and through a man named De Walt.

Q. Gilpin owned the stock?

A. He owned the stock of the company which was turned over to me, that is when they forfeited their lease.

Q. Did you ever do any mining on this property, on the Eastern Star mine?

A. No, sir.

Q. Was this mill on the mine?

A. No, sir.

Q. How far was it from the mine?

100 A. Well, I do not know exactly where their corner stakes are, but it was just across the creek a little west from the ground they claim; the lines have been changed there several times.

Q. It was not on this 10 acres of ground which is in controversy here?

A. Yes, sir.

Q. You say it was on the ten acres?

A. Yes, sir; that is if you take the mine at the center of the 10 acres.

Q. Upon what part of the mine was it as to its north and south end?

A. It was on the northeast portion of the 10 acres taking the shaft as the center of the 10 acres.

Q. You know where this 10 acres is?

A. Yes, sir.

Q. You did no mining, however?

A. No, sir.

Q. Did you go into the shaft or tunnels?

A. I have been in there several times.

Q. Did you at that time?

A. No, sir.

Q. Did you have any work done?

A. No, sir.

Q. Did you make any investigations to see whether there was a mine there or not?

A. Yes, sir; we panned the ore and had it assayed several times.

Q. Did you at that time?

A. We did in 1879; a lot of those mines were assayed and prospected by Professor Blake of New Haven.

Q. For whom?

A. For the grant.

Q. I understood you to say a moment ago, Mr. Adams, that this mine had been claimed by other parties in other names; who are they?

A. It has been leased to other parties, and under other names.

Q. When?

A. It was leased in 1879 by Governor Gilpin to a man named William Young.

Q. For how long a time did Mr. Young hold it?

A. It was leased to him for 99 years.

Q. For how long a time did he hold it?

A. He never did any work on it that I know of; he threw up the lease.

Q. Was he ever there?

A. He was.

101 Q. Do you know of him doing any work?

A. He did some work.

Q. You say his name was William Young?

A. William Young.

Q. Any one else—you say he did do some work?

A. Yes, sir; some; not very much.

Q. Where did he do any work, do you know?

A. I do not know; I could not tell you what shaft; there are a good many cuts, shafts and tunnels there.

Q. How do you know he did any work?

A. I loaned him forty dollars to get some grub to do some work with.

Q. And you know that he spent it on the work?

A. I do know he worked there a little while.

Q. But you do not know where?

A. He had a lease on three claims there up and down the gulch. I do not know which claim he worked on, whether on the Eastern Star or some other.

Q. Then you are not prepared to testify that William Young did any work on the Eastern Star mine?

A. No, sir; not on that mine; he had it under different names; I think he called it the White Chief or some such a name as that.

Q. Who else did Governor Gilpin ever lease that claim to?

A. He leased to the Gold Legion Mining and Milling Company.

Q. When was that?

A. In February, 1885.

Q. Mr. Adams, when was this northeast corner surveyed?
A. Surveyed two years ago.
Q. In 1892?
A. Yes, sir.
Q. Prior to that time there had never been any surveys of the grant to close it off?
A. No, sir; not for line two miles and a half east of the second mile post, and then down as far as the 13-mile post.
Q. I will ask you if that rough diagram over there on the board approximately shows the correct condition of the exterior lines of that grant?
A. Yes, sir; it does show the exterior line, but it does not correctly show the line of the trend of the range; that runs right across the initial corner.
Q. I think those marks are intended for the creeks?
A. No, sir; this was northeast and southwest, the creeks, but the lines that he has drawn there for the mountains should cross the I. C. corner.
Q. I am only asking with reference to exterior lines; that shows the condition of the exterior lines up to 1892?
102 A. Yes, sir.
Q. And it correctly shows their condition in 1876?
A. Yes, sir.
Q. That little square there just below the word "cottonwood" on the plat, does that approximately show the relative situation of the Eastern Star mine to the lines?
A. No, sir.
Q. Where would you place it?
A. It should be a little further west.
Q. Will you be good enough to mark it approximately relatively to those lines?
A. Here we have a map which is on a scale which gives it exactly; it is a section map.
Q. For the purpose of reference will you be good enough to mark on this map; just make a little mark here, just a little pencil mark.
A. For the mine?
Q. For the ten acres that are claimed for the mine.
A. Well, as I understand he wants the ten acres of which that is the center.
Q. Just you say where the mine is.
A. (Pointing at map.) Well, the mine is about there.
Q. That is just off the piece of platted ground represented on the map?
A. Yes, sir.
Q. About a quarter of a mile?
A. It is not quite so far as that; it is just at the edge of the survey.
Q. Mr. Adams, has this mine ever been fenced in?
A. No, sir.
Q. At any time?

A. No, sir; that is, the grant has been fenced but not the mine itself; it has been locked up.

Q. Well, that there may be no misunderstanding about it, has the entire grant ever been fenced in?

A. No, sir.

Q. Has it ever been so that miners and prospectors going in over the mountains could not go right where this mine was without crossing a fence?

A. They could by going over the range; a pretty hard trip to get over there; I do not think a man could get over without a burro.

Q. Mr. Adams, you stated that you had paid taxes upon this grant?

A. I have.

Q. Have you paid it upon the entire grant as a whole?

A. Yes, sir; I have paid all the taxes since 1877; some $66,000.

103 Redirect examination.

By Mr. VAILE:

Q. Mr. Adams, referring to this map which is entitled Luis Maria Baca Grant No. 4, which we will hereafter offer in evidence, I will ask you to point out on this map the point on this grant to which the fence had been run upon the east side of the grant, if you can tell?

A. Right in a little north of the 13-mile post.

Q. The 13-mile post is marked in small letters on the margin of the map?

A. Yes, sir.

Q. Point it out on the map to what point the fence had been extended on the north boundary of the grant?

A. It is fenced a little over a mile and a half east of the one-mile post—no, a little over a half a mile east of the one-mile post, and a mile and a half east of the initial corner.

Q. To the point where this summit comes up there?

A. Yes, sir; right at the top of that hog back.

Thereupon counsel for the plaintiff offered in evidence th photograph heretofore marked Exhibit 16, and the same is covered by the order of certification hereinafter set out.

Mr. VAILE: If the court please, except for what transpired at the last trial of this case, I should feel that we ought to rest our case at this point, but in view of the opinion expressed by the court upon two propositions—one as to the necessity of some evidence of the approval of the survey at Washington, the other as to the definiteness of description of the initial corner before the expiration of the three years fixed in the proviso of the statute—I feel that it is important for us, before resting this case, to go into evidence upon those two subjects. I would say, however, to the court, that, since the former trial of this case, I have examined the law on this subject very thoroughly, and I feel convinced that the court upon fur-

ther hearing would consider that the survey, as approved by the surveyor general, and upon the evidence already in, is sufficient, and that no additional approval in the Land Department at Washington was necessary. I also feel that the law is clear and explicit to the effect that when the survey is made it is conclusive that the land surveyed is the same as the land selected. In view, however, of the former opinion of the court, and as the matter is not in a shape to call for a discussion of the law again at this time, I will proceed to offer in evidence,—as we can make these matters explicit—certain facts which cover those two points.

Whereupon plaintiff called PETER H. VAN DIEST, who, after being duly sworn, testified as follows:

104 Direct examination.

By Mr. VAILE:

Q. Professor Van Diest, will you state your name to the jury?
A. Peter H. Van Diest.
Q. Are you connected with any official office in the city of Denver?
A. I am.
Q. With what office are you connected?
A. I am chief of the land division in the surveyor general's office.
Q. How long have you been connected with the surveyor general's office for the State of Colorado?
A. Since 1878.
Q. Continuously from 1878 to this time?
A. Yes, sir.
Q. You are familiar with its records and correspondence?
A. I am.

Through this witness, the plaintiff introduced exhibits numbered 17, 18, 19 and 20, heretofore set out in this record; and upon cross-examination of the same witness the defendant offered in evidence Exhibits A, B, C, D, E, and F, heretofore set out in this record; which said last-mentioned exhibits were also offered by the plaintiff in his own behalf.

And before proceeding with the further examination of said witness, the plaintiff, to further maintain the issues on his part, offered other documentary evidence as hereinafter set out.

Counsel for plaintiff offered in evidence two passages from Executive Document No. 1, House of Representatives, 38th Congress, 2nd session, being from the report of the Secretary of the Interior, transmitted by the President with the annual message to Congress; which report transmitting these documents bears date December 5th, 1864. The first offered is from page 24 of the report of the Secretary of the Interior, and that part of the report of the Secretary of the Interior which includes the report of the Commissioner of the General Land Office.

Whereupon, said passage offered in evidence was admitted by copy, which copy was marked Exhibit 21.

EXHIBIT 21.

"In Colorado Territory the returns of surveys for the last fiscal year consist of correction, parallel, township and sectional
105 lines, with fifty miles of private grant embracing over 431,000 acres of public lands. Also, 92,292 acres in the fourth location of the Las (Vejas) grant, as confirmed by the act of 21st June, 1860, to the heirs of Luis Maria Baca, the premises formerly falling within the limits of New Mexico, but now of Colorado."

Report of Secretary of the Interior for 1864, page 24.

Counsel for plaintiff thereupon offered in evidence, from page 95 of the same report of the Secretary of the Interior, document D, which is the report of the surveyor general of Colorado, included in the report to Congress, under date of October 1st, 1864.

Whereupon, said passage was offered in evidence by copy, which copy was marked Exhibit 22.

EXHIBIT 22.

"During the month of November, 1863, Deputy Surveyor A. Z. Sheldon made a survey of Grant No. 4 of the heirs of Luis Maria Baca, as located by William Gilpin, attorney for said heirs, under the act of June 21, 1860. The survey was made under the usual guarantees of its accuracy, and the field-notes returned to this office for approval. Under instructions from the General Land Office dated February 12, 1864, that survey and location were approved, subject to the conditions and restrictions above referred to."

Surveyor General's Report of Oct. 1, 1864, included in Report of Secretary of the Interior for 1864, page 95.

Whereupon, counsel for plaintiff offered in evidence for the purpose of showing the segregation of this grant from the public domain at that time, the map accompanying the report of the Secretary of the Interior for the year 1864, which shows Baca Grant No. 4 as segregated from the public domain, and which is a part of the printed volume above referred to.

Whereupon, said map was received in evidence and marked as Exhibit No. 22½, and is included in the order of certification hereinafter set out.

Thereupon, plaintiff's counsel offered in evidence a map of the State of Colorado, bearing the signature of Joseph Wilson, Commissioner duly certified by the Commissioner of the General Land Office, bearing date October 2nd, 1866, which shows Baca Grant No. 4 segregated from the public domain.

Objected to by counsel for defendant as immaterial, and it has gotten fairly beyond the period of time at which the action
106 of the Government has relation to this grant as a specific thing, and as to its right after that it was dealt with merely as an existing physical fact.

Mr. VAILE: That is an admission that our rights matured at the time we say, which is twelve years before your rights were initiated.

Mr. SMITH: There is no question but what your folks think you own the Baca grant.

Mr. VAILE: It is not what we think, but the action of the Government in the recognition of our right.

Mr. SMITH: I submit that none of these recognitions have an official action after they terminated it; that nothing that the Government did can in any manner bear upon the question whether or not this was mineral land and whether or not it being mineral land it had been taken by the applicant; it merely recognized that a certain piece of ground twelve and a half miles square was claimed as being the Baca grant; that the question at issue here was not before any person in any shape or form, who acted in reference to the condition of that grant after the time when the surveyor general approved it, and that their rights must stand or fall upon the rights which they obtained by the approval of the surveyor general on the 18th of March, 1864.

The COURT: What is the date of this?

Mr. VAILE: The date of this map is 1866.

The COURT: Put it in.

Counsel for defendant thereupon saved an exception to the ruling of the court admitting said map in evidence.

Mr. VAILE: I will simply call the attention of the jury to the fact that this is a map of Colorado made in 1866, bearing the signature of the Commissioner; that the Baca claim is marked on it in square form adjoining the 38th parallel of latitude.

Whereupon, said map was received in evidence and marked as Exhibit 23, and is covered by order of certification hereinafter set out.

Whereupon, counsel for plaintiff offered in evidence a sentence from the report of the Commissioner of the General Land Office for the year 1866, being the report which was accompanied by
107 this map just introduced, and being the printed report of the Commissioner of the General Land Office, at page 104 thereof.

To which counsel for defendant objected for the same reasons as before, that it is a statement made by some officer of the Government long after this approval upon which counsel insists the rights of this claim must rest as a matter of law.

The COURT: Read it.

Whereupon the same was admitted in evidence and marked Exhibit 24.

EXHIBIT 24.

"A small settlement has recently been made near the lake on Baca Float No. 4, belonging to Governor Gilpin."

Surveyor General's Report, August 15, 1866, included in Report of Commissioner of the General Land Office for 1866, page 104.

Whereupon, counsel for plaintiff offered in evidence a transcript certified by the Commissioner of the General Land Office, of a portion of a manuscript map in that office bearing the original signature of Joseph S. Wilson, Commissioner, which covers that portion including Baca Grant No. 4, and shows its segregation from the public domain, bearing date November 5th, 1868.

To which counsel for defendant objected for the reasons last above stated, that it is long after the approval of this survey, and that no inference ought to be drawn supporting rights not given, granted and created by the acts of the proper officers of the Government at the time that this selection was approved, and that the approval when made cannot be extended.

Which objection was by the court overruled

To which ruling of the court counsel for the defendant then and there duly excepted.

Said manuscript was then received in evidence and marked Exhibit 25, and is covered by order of certification hereinafter set out.

Mr. VAILE: If the court please, as the Supreme Court and the Land Office have held by various decisions that the certification of such maps is evidence of the approval by the Land Office of the surveys themselves, I offer in evidence the fact, evidenced by the map I now have in my hand, that on August 26th, 1867, the Commissioner of the General Land Office, over his signature and the
108 seal of his office, certified the plat of Baca grant from his records.

Mr. SMITH: This is a copy of the map already offered.

Mr. VAILE: Yes, sir; it is the date of the certification which is the feature which I wish to bring out; that on August 26th, 1867, the Commissioner of the General Land Office certified from his records a copy of Baca Grant No. 4.

Mr. SMITH: I understand then that the only thing counsel offers is the fact that in August, 1867, the Commissioner of the General Land Office was willing to, and did, issue a certified copy of the plat then in his office, which is already in evidence in this case?

Mr. VAILE: The willingness is a matter of conclusion; the fact that he did is what we are offering.

To which offer counsel for defendant objected as not in any manner tending to extend the legal rights given by the map which is there certified.

Which objection was by the court overruled.

To which ruling of the court the said defendant, by counsel, then and there duly excepted.

And thereupon the certificate attached to a copy of the plat heretofore introduced as Exhibit No. 7, was introduced in evidence as Exhibit No. 25½, and is as follows:

EXHIBIT 25½.

"I hereby certify that the above map is a true copy of the map of Baca Grant No. 4, on file in this office.

JOS. S. WILSON,
Commissioner.

General Land Office, August 26, 1867."

Mr. VAILE: I will say to the court that this map was followed right up from year to year; for instance, for the year 1867 I have an official map made by the Commissioner of the General Land Office, which again shows the segregation of this grant from the public domain, and it has been so carried on successive maps from 1864 right down to date.

Mr. KELLOGG: I have one made last year.

Mr. WOLCOTT: Which is eminently correct.

Counsel for plaintiff then offered in evidence an original letter to John S. Watts, who was one of the holders of this grant,
109 from Joseph Wilson, Commissioner, bearing date January 14th, 1868, declining to issue a patent and giving the reasons therefor.

To which counsel for defendant objected because it appears that at that time said Watts had no interest in said grant, and in any event the action of the Commissioner in declining to issue the patent can in no manner extend nor abridge their rights.

Which objection was by the court overruled.

To which ruling of the court, defendant by counsel then and there duly excepted.

Which letter was received in evidence and marked Exhibit 26, and is as follows:

(EXHIBIT No. 26.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *January* 14, 1868.

Hon. J. S. Watts, present.

SIR: Referring to your application of 12th inst. for the issuing of patent for the tract of land in Colorado known as "Baca Tract No. 4," I have to state that the selection authorized by the 6th section of the act of 21st June, 1860 (Stats. vol. 12, page 72) has been made, and the survey executed and reported to this office, but as no provision is made in the statute for the issuing of patent, the survey and statute are the only authorized evidences of title, this office having no authority to issue patents unless the statute expressly orders the same, which is not done in the Baca case, but "that a grant may be made by a law as well as a patent pursuant to a law is undoubted (6 Cr. 128); a confirmation by a law is as fully to all

intents and purposes a grant, as if it contained in terms a grant *de novo*."

(12 Peters' Reports of the Decisions of the Supreme Court of the United States, page 454.)

Very respectfully, your ob't serv't,

JOS. S. WILSON,
Commissioner.

Counsel for plaintiff next offered in evidence an original letter of Joseph S. Wilson, Commissioner of the General Land Office,
110 to John S. Watts, transmitting certain papers, the papers being the ones already offered in evidence under the certificate of May 4th, 1868, attached to Exhibit No. 6, heretofore set out in this record.

Which offer was objected to as immaterial.

Which objection was by the court overruled.

To which ruling of the court the said defendant, by counsel, then and there duly excepted.

Whereupon said letter was received in evidence, marked Exhibit 27, as follows:

(EXHIBIT No. 27.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *May 4th*, 1868.

Hon. John S. Watts, Washington, D. C.

SIR: In compliance with the request contained in your letter of the 2nd inst., I have the honor to enclose herewith, certified copies of the application of the heirs of Luis Maria Baca to locate claim No. 4 in Colorado, confirmed to them under the act of Congress approved June 21, 1860; a certificate of the surveyor general of Colorado in regard to the character of the land included in said location and a copy of the field-notes of the survey thereof.

In accordance with the provisions of the act of Congress approved July 2nd, 1864, the cost attending the preparation of the aforesaid documents and the certificate is seven dollars, which it is expected you will remit to this office at your earliest convenience, to be paid into the U. S. Treasury.

I have the honor to be, very respectfully, your ob't servant,

JOS. S. WILSON,
Commissioner.

Counsel for plaintiff then offered in evidence a certificate of a list of private claims, including Baca Grant No. 4, bearing date in 1869, from the official report of the Commissioner of the General Land Office, printed in the latter part of 1869.

To which counsel for defendant objected for the reasons before stated; that it is immaterial because merely confirming the
111 fact that the Government had recognized the location of this claim, and approved a survey and plat of it, and in so far as the act would give title the Government had stated that this land

had been selected; but our objection is, and it goes to the root of all these matters, that what was granted, and what was approved by the surveyor general cannot be in any manner extended or increased by any of these subsequent recitals of any officer of the Government after the fact.

Which objection was by the court overruled.

To which ruling of the court the said defendant, by counsel, then and there duly excepted.

Whereupon said certified copy of a list of private claims was received in evidence and marked Exhibit 28, as follows :

(EXHIBIT No. 28.)

"D."
W. H. W.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 7, 1895.

I, Edw. A. Bowers, acting Commissioner of the General Land Office, do hereby certify that the annexed copy of a list of certain private land claims confirmed by Congress, with the designations thereof, names of confirmees, dates of confirmation and area of each claim so far as the same had been ascertained by United States surveys, is a true and literal exemplification of an official statement over the signature of Jos. S. Wilson, Commissioner of the General Land Office, and bearing date of November 1, 1869, and included in the annual report of the aforesaid Commissioner to the Secretary of the Interior, for the year 1869; and that the same appears at page 399 of said official report as the same was originally published, and as reprinted pursuant to certain resolutions of the Senate of the United States, and of the House of Representatives, passed on July 13, 1870, and July 15, 1870, respectively, as set forth in the reissue of the report of 1869, aforesaid.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

EDW. A. BOWERS,
Acting Commissioner of the General Land Office.

112 *Private Land Claims.*

Designation.	Name.	Confirmee.	Under act of—	Area in acres.
1	San Juan Bautista del Ojito del Rio de las Gallinas.	Preston Beck, Jr	June 21, 1860	318,699.72
2	Town of Tomé	Inhabitants of the town	Dec. 22, 1858	121,594.53
3	Tierra Amarilla	Francisco Martinez *et al*	June 21, 1860	Not surveyed.
5*	Town of Casa Colorado	Inhabitants of the town	Dec. 22, 1858	Do.
6*	Brazito	Legal representatives of Juan Antonio Garcia	June 21, 1860	Do.
7	Town of Tecolote	Inhabitants of the town	Dec. 22, 1858	21,636.83
8	Los Frigos	Legal representatives of Francisco Trajillo, Diego Padilla, and Bartolome Marquez.	June 21, 1860	12,545.66

Private Land Claims—Continued.

Designation.	Name.	Confirmee.	Under act of—	Area in acres.
9	Junta de las Rios	John Scolly, Guillermo Smith, Gregario Trajido, Augustin Duran, Santiago Giddings, and Francisco Romero.	June 21, 1860	Not surveyed.
10	Nuestra Senora de la Luz	John Lamy, bishop of New Mexico.	June 21, 1860	16,546.35
11	Town of Chillili	Inhabitants of the town	Dec. 22, 1858	38,435.14
12	Agua Negra	Antonio Sandoval	June 21, 1860	Not surveyed.
13	Town of Belen	Inhabitants of the town	Dec. 22, 1858	194,663.75
14	San Pedro	José Serafin Ramirez	June 21, 1860	35,911.63
15		Charles Beaubien and Gaudalupe Miranda.	June 21, 1860	Not surveyed.
16†		Jose Leandro Perea	June 21, 1860	Do.
18	Canon de Pecas	Legal representatives of Juan Estevan and legal representatives of Francisco Ortiz, Jr., and Juan de Aguilar.		Do.
16	Rancho of the pueblo of San Cristoval.	E. W. Eaton, assignee and legal representative of Domingo Fernandez and others.	June 21, 1860	27,854.06
20	Town of Las Vegas	Inhabitants of the town	June 21, 1860	496,446.96
1‡	Location No. 1	Heirs of Luis Maria Cabeza de Baca, in lieu of "Las Vegas Grandes."	June 21, 1860	Not surveyed.
1‡	Location No. 2	Do.	June 21, 1860	99,239.39
21	Town of Tajique	Inhabitants of the town	June 21, 1860	Not surveyed.
22	Town of Torreon	Do.	June 21, 1860	Do.
23	Town of Manzano	Do.	June 21, 1860	Do.
24	San Isidro	Legal representatives of Antonio Armenta and Salvador Sandoval.	June 21, 1860	Do.
25	Town of Cañon de San Diego.	Inhabitants of the town	June 21, 1860	Do.
27	Town of Las Trampas	Do.	June 21, 1860	Do.
113				
28		Legal representatives of Sebastian Martin.	June 21, 1860	Do.
29	Town of Anton Chico	Inhabitants of the town	June 21, 1860	389,662.72
30	Rancho of Pagnate, rancho of El Rito, Giganto Cañon, and rancho of San Juan and Santa Ana.	Indians of the pueblo of Laguna	June 21, 1860	Not surveyed.
31		Legal representatives of Vicente Duran y Armijo.	June 21, 1860	Do.
32	Town of Mora	Inhabitants of the town	June 21, 1860	Do.
33	Valverde and Fray Cristoval.	Heirs of Pedro Armendares	June 21, 1860	Do.
34		Do.	June 21, 1860	Do.
35	Bosque del Apache	Antonio Sandoval	June 21, 1860	Do.
36	Town of Chamito	Inhabitants of the town	June 21, 1860	Do.
37	Town of Tejon	Do.	June 21, 1860	Do.
38		Legal representatives of Pedro Sanchez.	June 21, 1860	Do.
43	Ortiz mine	Elisha Whittlesey, Abraham Renchor, Ferdinand W. Risque, Nathaniel M. Miller, Joseph F. Walker's representatives, Charles E. Sherman, and Andrew J. O'Bannon.	Mar. 1, 1861	69,458.43
70	Cañon del Agua	Jose Serafin Ramirez	June 12, 1866	3,501.21

* The claim of Casa Colorado is numbered 29 in the act of confirmation, but in the corrected list of private claims (see letter of surveyor general of January 12, 1858,) it is numbered as above.

† The claim of E. W. Eaton is numbered 16 in the act of confirmation, but should have been numbered 19. It seems to have been accidentally omitted in the corrected list.

‡ The heirs of Luis Maria Cabeza de Baca, by the act of June 21, 1860, were granted, in lieu of "Las Vegas Grandes," which they claimed, the same amount of land contained in the Las Vegas town grant, to be located by them in square bodies, not exceeding five in number. The heirs of Baca have located said grant in five square bodies, viz: Nos. 1 and 2 in New Mexico, Nos. 3 and 5 in Arizona, and No. 4 in Colorado.

JOS. S. WILSON,
Commissioner.

Department of the Interior, General Land Office, November 1, 1869.

Thereupon it was stipulated by and between plaintiff and defendant that the map of the United States printed with the report
114 of the Commissioner of the General Land Office for the year 1869, shows a segregation of Baca Grant No. 4 from the public domain; subject to the same objection before stated. Also stipulated that the map of Colorado printed with the report of the Commissioner of the General Land Office for the year 1876, which brings it down to the date of defendant's claim, shows Luis Maria Baca Grant No. 4, segregated from the public domain, and its relation to public surveys, subject to the objection of its irrelevancy and incompetency as before.

Plaintiff's counsel thereupon resumed the examination of the witness, as follows:

Q. Mr. Van Diest, have you brought with you the original field notes of the survey of fractional township 43, north of range 11, east New Mexico principal meridian?

A. I have.

Q. When was that survey made?

A. The south boundary of township 43, north, range 11, east, along the north boundary of Baca grant was surveyed August 27th, 1873, and the east boundary of that township was surveyed August 28th and 29th, 1873.

Q. You may state whether there were any earlier surveys of the public land adjacent to Baca grant,—were these the first surveys adjacent to Baca grant?

A. Those were the first surveys.

Q. I will ask you to turn to the lines run along the south boundary line of that township and show what references in it are made to boundaries or monuments of Baca Grant No. 4; is the south (boundd*a*ry) of this fractional township coincident with north line of Baca Grant No. 4?

A. It is.

Q. I want you to read only that portion which, following along the north boundary of the township, shows the connection of the public surveys thus made with the previous public survey of the Baca grant.

A. (Witness read as follows:) Beginning at the southwest corner of this fractional township, I run east — along the south boundary of section 7, 23 chains, 81 links, to corner No. 43 in Baca Grant survey.

Q. To corner No. 43 in Baca Grant survey?

A. Yes, sir.

Q. Then passing on does it go on the south boundary of section 8?

A. Yes, along south boundary of section 8, 23 chains, 70 links, to corner No. 44, Baca grant.

Q. And running along south line of section 9?

A. The connection was made from the southwest corner of said section to corner 45 in Baca Grant survey, 23 chains and 68 links.

115 Q. Section 10?

A. From the southwest corner of said section to corner number 46 of Baca Grant survey, 24 chains and 45 links.

Q. And in section 11?

A. 24 chains, 46 links, to corner 47 in Baca Grant survey.

Q. Section 12?

A. In section 12, 24 chains, 60 links, to corner No. 48 of Baca Grant survey.

Q. I will ask you to state whether all of the southern tier of sections in that fractional township 43 north, 11 east, are tied to and connected with corners of Baca grant shown by the Sheldon survey?

A. They are.

Q. You may state whether the surveys you were reading from are official surveys made by the Government of the United States?

A. They are original field-notes as taken by the surveyor who made the contract with the Government to survey these lands, and which were approved and accepted as the official field-notes by the Government.

Q. That carries you through the tier of sections; now, if you please, you may turn to the subdivisional lines of the township lying east, and which lies north of that part of the Baca grant on which the initial corner is found, in township 43 north, range 12 east. What I wish to ask you there is in reference to the description of the character of land; what is the first section that is taken up there, and what is the first line running east?

A. This tract and the notes thereof, as surveyed, started with the survey along the south boundary of fractional township 43 north, range 12 east.

Q. Won't you state what is the character of the land as shown by the official field-notes for the south boundary of section 7, being along the north boundary of Baca grant, in this fractional township?

A. The statement is that the land is rolling, soil second rate, on south boundary of section 7.

Q. I will ask you to state what is said in those field-notes of the survey of section 8, in the same township, as to the character of the land along the south boundary line?

A. Last half mile broken, suitable only for grazing.

Q. In the next mile or two of that, what is the character of the southern boundary?

A. "Land extremely rough and rocky. From the rocky nature of the mountains I find it impossible to extend the survey of this line further east."

116 Q. Do you know from investigations you have made where the initial corner of the Baca grant is in reference to these sections, as to whether it is on the south boundary of one of them, and which one?

A. Yes, sir.

Q. On which section is it?

A. It must be on the south boundary of section 8.

Q. From the field-notes, Mr. Van Diest, will you please show the character of the country on a line running north from Baca grant between sections 8 and 7 in this township?

Mr. SMITH: You are commencing west of the initial corner?

Mr. VAILE: Running north; the purpose is to find, in the immediate vicinity, the character of the land.

A. The land broken and hilly.

Q. I will ask you to state whether in following that line there are any mountains spoken of?

A. At 46 chains north of the southwest corner is the foot of a mountain, and at 54 chains from that same point the top of a sharp ridge bearing northwest and southwest.

Q. Won't you turn to the account of the character of the land on the north line of section 6, from the Creston creek, east?

A. East half mile very mountainous.

Q. Won't you turn to the east line of section 8, which is about three-quarters of a mile east of the initial corner, running north; what is the description of that land?

A. That is between eight and nine.

Q. Yes, sir, between 8 and 9.

A. "Land nothing but rocks."

Q. I think that is sufficient from these field-notes. But won't you go west—take the south boundary of section 12 in township 43 north, range 11 east, which is also on the north boundary of the Baca grant, and commences a little over a mile west of the initial corner?

A. Land level; soil, first half mile, first rate; last half, second rate. Good grazing the last 12 chains.

Q. That is going east, is it?

A. Yes; in other words, soil of the second rate is right down at the corner next to the range line.

Q. Professor Van Diest, have you, from the official notes of the surveyor general's office, made up a sketch or plat upon which is marked the character of the land, as shown by the field-notes, for the part of the country we have just been speaking of?

A. I have.

Q. Is this the map (handing witness a map)?

A. It is.

117 Q. Did you prepare it?

A. I prepared it.

Q. Is it correct from the field-notes?

A. I have followed the field-notes correctly.

Q. Have you also marked upon it from the field-notes of the Sheldon survey of the Baca grant the description of the land at the corresponding positions?

A. I have.

Q. And it correctly represents it?

A. It does.

Whereupon said map was offered in evidence by counsel for the

plaintiffs, and marked Exhibit No. 29, and is included in the order of certifications hereinafter set out.

Mr. SMITH: Professor, in making up this map you have also made use of the field-notes of the Sheldon survey?

A. Yes, sir.

Q. Going east from the initial corner, Professor, is there any other official survey of that line than the Sheldon survey at present in your office?

A. There is.

Q. For what township and range and sections?

A. Oh, east of the initial corner?

Q. Yes, sir.

A. Not in connection with the public surveys now, but the line has been extended.

Q. Then the only field-notes to which you have had access going east from the initial corner are the field-notes of the Sheldon survey and of the Darby survey?

A. No, there is one mile of the township, this survey of township 43 north, range 12 east.

Q. Which you have already given?

A. Yes.

Q. And east of that mile is the Darby and Sheldon surveys?

A. Yes, sir.

Q. The Darby survey was made for the purpose of establishing the northeast corner of the Baca grant?

A. Yes, sir; in the northeast corner.

Q. Then the land lying immediately north of the Baca grant, after you get a mile east of the initial corner, has never been sectioned by the Government?

A. For about a mile.

Mr. VAILE:

Q. Does it not run something over a mile; how far is that from this line (pointing on map)?

A. Nearly a mile and three-quarters. This was sectionized,
118 including section 10 and section 3, but the line here was not extended; the line between sections 3 and 10 was extended.

Q. The official Government survey of the adjacent township to Baca grant, made in 1873, was surveyed east of the initial corner along the line of the boundary of the grant for a mile and almost three-quarters?

A. Was made for a mile and almost three-quarters east of the initial corner.

Q. And that is shown upon the map you have made?

A. Yes, sir.

Cross-examination.

By Mr. SMITH:

Q. Professor, has your attention been called by counsel to all of the letters with reference to this survey and plat which was approved

March 18th, 1864, between the surveyor general of Colorado Territory and the Commissioner of the General Land Office?

A. You mean by Mr. Vaile?

Q. Yes.

A. No, he has not asked for all the letters.

Q. You have the record there of the other correspondence between your office and the office at Washington?

A. I have.

Thereupon counsel for defendant introduced certain letters hereinbefore set out in this record, being Exhibits A, B, C, D, E and F.

After the production of said letters, and the introduction of the same in evidence, the cross-examination of the witness continued, as follows:

Mr. SMITH:

Q. Professor, can you quickly turn to that portion of the field-notes where the surveyor stated that it was impossible to proceed further east, or can you identify that point?

Mr. VAILE: Are you referring to Baca Grant or township surveys?

Mr. SMITH: The township surveys.

Q. Can you identify the point on the map? If you can do that you need not turn to it. Where is it relatively from the initial corner?

A. The southeast corner of the section 9; from this point here (indicating) it is not possible to go any further from here.

119 Q. The termination of the Sheldon survey and the termination of the survey north of it reach the same point then going east?

A. The Sheldon goes a little further; here is the initial corner (indicating); here is mile number one, and mile number 2 has been set, the second mile corner has been set by Sheldon about 30 to 40 chains easterly of this point, the southeast corner of section 9.

Q. By the Government survey of 1873?

A. Yes, sir.

Q. The southeast corner of section nine is the point where the surveyor then said he could not extend further east?

A. Yes, sir.

Q. And at the same point Mr. Sheldon did, as a matter of fact, proceed to set another mile post beyond that going east?

A. Yes, sir.

Q. Now, will you be good enough to refer precisely to the original field-notes that you have in your hand which states that, so that there may be no misunderstanding about it?

A. At the end of the south boundary of section 9, after the surveyor came to the southeast corner of section 9, he states the ground to be "extremely rocky, and from the rough nature of the mountains, I find it impossible to extend the survey of this line further east," probably to take a whole section more in.

Q. That is a mile and a half east of the initial corner?

A. Very nearly.

Mr. VAILE: A mile and three-quarters?
Mr. SMITH: A mile and three-quarters, yes.

Q. Professor, have you ever been upon this grant?
A. No, sir.
Q. Or over that line?
A. No, I never have been.
Q. Do you know, Professor, from the records in your office, just where the 38th parallel of north latitude crosses that range?
A. We cannot determine it exactly, only by reference to points east and west where the observation has been made.
Q. I asked you if you knew where the 38th parallel crosses the range, from the records of your office?
A. I can only estimate.
Q. Do you know whether or not this initial corner upon the north line of the Baca grant is upon the 38th parallel?
A. According to the Sheldon survey it is exactly upon it.
Q. Do you know from all the records of your office, whether or not the initial corner is upon the 38th parallel?
120 A. From our fractional township lines up to the corner the line is a little south of the 30th parallel.
Q. How many times, so far as you know, within your knowledge has the exact location of the 38th parallel been ascertained by official surveys made under the direction of the Government?

Objected to as not proper cross-examination, and not a matter of legitimate evidence.
The COURT: I do not think it is cross-examination.

Redirect examination.

By Mr. VAILE:

Q. Do you know how long Mr. Case was surveyor general of Colorado?
A. I believe two years.
Q. He was the first surveyor general of the Territory?
A. Yes, sir; he was the first, from 1861 until some time in 1862 or 1863, when General Pierce was his successor.
Q. Do you know how long Pierce was surveyor general?
A. About four years, not full four years.

Mr. VAILE: If the court please, when I introduced Mr. Van Diest in connection with this correspondence, it was for the purpose of bringing forward specially, among other things, certain letters of which I did not have certified copies. There are a great many letters of which I have certified copies from the Commissioner of the General Land Office, which I expected at some proper stage in this case to introduce upon our behalf, including most of those that counsel brought out in the cross-examination of Professor Van Diest. Of course, it is unnecessary to duplicate the record, and I will ask to have these several letters which counsel offered in evidence in behalf of the defendant in the cross-examination of Professor Van Diest introduced as exhibits on behalf of the plaintiff.

Now, if the court please, following that I offer in evidence a certified copy of a letter. By way of introduction of this letter, if the court please, I will state that after the application for patent by Watts, which was declined by the letter of January 14th, 1868, already offered in evidence, a slight change of phraseology in the law induced Governor Gilpin to go personally to Washington and apply for a patent again. This resulted in an official communication of date March 21st, 1879, from the Commissioner of the General Land Office to the surveyor general of Colorado, which I now offer in evidence.

Which offer was objected to by counsel for the defendant
121 as being immaterial, as many years elapsed after the occurrences upon which the plaintiff's title rested, and it was after the filing of our location, even after our possession of this mining claim, as shown by the evidence introduced here on the part of the plaintiff, and as not tending to pass any title to mineral land by virtue of this grant.

Which objection was by the court overruled.

To which ruling of the court counsel for defendant then and there duly excepted.

Whereupon said certified copy was received in evidence and marked Exhibit No. 30, and is as follows:

(EXHIBIT No. 30.)

"D." DEPARTMENT OF THE INTERIOR, G. B. E.
GENERAL LAND OFFICE,
WASHINGTON, D. C., *M'ch 21st*, 1879.

Mr. Wm. L. Campbell, surveyor gen'l of Colorado.

SIR: I have considered the application of Hon. Wm. Gilpin for a patent to the tract of land known as Baca Claim No. 4, in Colorado.

Section six of the act of Congress approved June 21, 1860, provided that the heirs of Luis Maria Baca might select a quantity of land equal to that claimed by the town of Las Vegas, to be located on vacant non-mineral land in New Mexico, in square bodies not to exceed five in number, the same when selected by the heirs to be surveyed and located by the surveyor general of New Mexico.

It was subsequently ascertained that the quantity of land claimed by the town of Las Vegas, and therefore the amount to be selected by the Baca heirs, was 496,446.96 acres.

In 1863, the Baca heirs selected the tract of land now in question. This was the fourth tract, three having been previously selected, and therefore this tract was designated as Baca Claim No. 4. It contains 99,289.39 acres being one-fifth of the amount granted to said heirs.

Thus was at the time of its selection in the Territory of Colorado; but at the date of the act making the grant June 21, 1860, the tract
was a part of the Territory of New Mexico.

122 After the selection of this tract it was surveyed and located by the surveyor general of Colorado, he having first determined that the land was vacant and non-mineral.

The seventeenth section of the act of Congress, approved Feb. 28, 1861, gave the surveyor general of Colorado the same authority concerning the location of this tract as was originally conferred on the surveyor general of New Mexico.

After the selection, but previous to the location, the Commissioner of the General Land Office instructed the surveyor general of Colorado that as the statute did not authorize the issuing of a patent, the act of June 21, 1860, and the plat approved by the surveyor general would constitute the evidence of title.

There is no doubt that Government may convey and vest the legal title without issuing a patent as effectually as may be done by patent. Larriviere *v.* Madegan, 1 Dillon, 455; Gregnon *v.* Aster, 2 Howard, 319; 3 Opinions of Att'y Gen., 350.

The surveyor general was authorized by the act to locate only vacant non-mineral land. Unless the contrary appeared, it would be presumed from the act of locating that the surveyor general determined the land was not mineral. But before locating, the surveyor general had expressly found and certified that this land was not mineral.

It is now alleged that the land is mineral; that the surveyor general approved the plat of survey "subject to the conditions and provisions of section six of the act of Congress, approved June 21, 1860," and that therefore the grantees cannot hold the land under that act.

The conditions and provisions of the act of June 21, 1860, were as respects this question, that the selection and location should be on land determined at the time of such location, when the title passed, to be non-mineral land.

The act did not intend that if at any subsequent time in the remote future, mineral should be discovered, the title should be unsettled, or that the title should be the subject of controversy through all time, as often as any one might choose to allege its mineral character.

The surveyor general did not undertake, and had no power, to impose conditions not in the act.

If after fifteen years the question as to the mineral character of the land may be reopened, why may it not be raised again after the lapse of any number of years? If the question may be re-
123 opened as to the land granted under the provisions of the act of June 21, 1860, why may it not as to land acquired under the homestead, pre-emption and other acts of Congress? Would such titles ever be considered secure?

The question as to the mineral or non-mineral character of this land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals; this office has no authority to reopen the question; the land cannot longer be regarded as a part of the public domain.

Mr. Gilpin, who claims this tract of land as the assignee of the Baca heirs, makes personal application for a patent. It is not claimed that the granting act authorized a patent to issue, but that it is authorized by section two of the act approved March 3, 1869.

(15 Stat., 342) and by sec. 2447 Rev. Stat. U. S. But those provisions authorize patent to issue only when claims to land have been confirmed by law; that is, where an act of Congress recognizes a claim to specific land, and does not apply to cases where the acts of Congress only authorize a claim to be made thereafter to land without regard to any specific tract or parcel of land. This office can issue patents only where it is authorized by some act of Congress. The application of Mr. Gilpin for a patent must therefore be refused.

Very respectfully, J. A. WILLIAMSON,
Commissioner.

Certified by the Commissioner of the General Land Office, under the seal of said office, the 27th day of April, 1894.

Whereupon counsel for plaintiff, in order to show the continued recognition of this decision by the department as its determination upon the subject, next offered in evidence a letter bearing date June 28th, 1884, upon the same subject, by N. C. McFarland, who was then the Commissioner of the General Land Office, addressed to W. Neil Dennison, Canon City, Colorado.

To which offer counsel for defendant objected for the reasons last above stated in relation to the Williamson letter, and all letters and papers since the approval of the plat.

Which objection was by the court overruled.

To which ruling of the court said defendant, by counsel, then and there duly excepted.

124 Whereupon said letter was received in evidence and marked Exhibit 31, and is as follows:

(EXHIBIT No. 31.)

"D." DEPARTMENT OF THE INTERIOR, W. H. W.
GENERAL LAND OFFICE, J. R. D.
WASHINGTON, D. C., *June 28th*, 1884.

W. Neil Dennison, Esq., Canon City, Colorado.

SIR: I have received, by performance from the department, your letter of June 12th inst. addressed to the Hon. Secretary of the Interior, relating to the Baca location, No. 4, ("Gilpin grant,") in which you inquire 1st if said grant is located on mineral or non-mineral land; and 2nd, if prospectors will be allowed to hold any mineral discoveries made on said No. 4, prior to the year 1880.

In reply to said inquiries, I have to say, that by the 6th section of the act of June 21, 1860, (12 Stat., 71) the heirs of Baca were authorized to select the quantity of land awarded to them, in not more than five square bodies, upon vacant, non-mineral land; and it was made the duty of the surveyor general to make survey and location of the land selected, of course subject to the conditions imposed as to the character of the land awarded.

In the case of location No. 4, in question, the surveyor general having first ascertained and determined that the land selected was vacant and non-mineral, surveyed and located it, and approved the

plat of the location, March 18, 1864, and this approved plat, in the absence of any provision of law for the issuing of patent, became the evidence of title in the owner of the land so located.

On a subsequent application by Gov. Gilpin for a patent, it was contended, before this office, that mineral existed in some part of the location, and therefore the grantee could not hold the land under the act. The matter was fully considered and the following conclusions reached:

"The conditions and provisions of the act of June 21, 1860, were, as respects this question, that the selection and location should be on land determined, at the time of such location, when title passed, and to be non-mineral.

"The act did not intend that if at any subsequent time, in the remote future, mineral should be discovered, the title should be unsettled, or that the title should be the subject of controversy through all time, as often as one might choose to allege its mineral character.

"The surveyor general did not undertake, and had no power to impose conditions not in the act.

"The question as to the mineral or non-mineral character of the land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals, and this office has no authority to reopen the question; the land can no longer be regarded as a part of the public domain."

You will see by the foregoing that the land in question was determined, in 1864, by the surveyor general, whose province and duty it was, to be non-mineral; the location was then perfected and the title passed. Whether prospectors will be allowed to hold any mineral discoveries thereon, prior to or since 1880, must probably rest between them and the holders of the location No. 4.

Respectfully, N. C. McFARLAND,
Commissioner.

Certified by the Commissioner of the General Land Office, under the seal of said office, the 27th day of April, 1894

Mr. VAILE: I offer one more letter of like nature, and that I think closes this character of evidence. It is dated June 8th, 1889, addressed to John Duncan and Co., Westcliffs, Colorado.

Which said letter was received in evidence and marked Exhibit Number 32, and is as follows:

(EXHIBIT No. 32.)

"D." DEPARTMENT OF THE INTERIOR, W. O. C.
GENERAL LAND OFFICE, W. H. W.
WASHINGTON, D. C., *June* 8, 1889.

Jno. Duncan & Co., Westcliffs, Colo.

GENTLEMEN: I am in receipt, by reference, of your letter dated the 18th ult., addressed to the Hon. Secretary of the Interior, in re-

gard to mines and minerals within the surveyed limits of
126 "Baca Claim No. 4," commonly known as the "Gilpin grant."

In reply I have to say, that by the 6th section of the act of Congress approved June 21, 1860, the Baca heirs were permitted to select a quantity of land equal to that claimed by the town of Las Vegas, to be located on vacant, non-mineral land in New Mexico, in square bodies not to exceed five in number; the same when selected by the heirs, to be located and surveyed by the surveyor general of New Mexico.

It was subsequently determined that each of said tracts should contain 99,289.39 acres; the one-fifth part of the area claimed by the town of Las Vegas.

In the year 1863 said heirs selected the tract in question, three other tracts having been previously selected.

At the time of its selection this tract was in Colorado, but at the date of the act (June 21, 1860) the tract was in the Territory of New Mexico.

Thereafter, Mr. Gilpin,—who claimed the land as the assignee of the Baca heirs,—applied for a patent, which was denied him; for the reason that there was no provision of law for the issuance of patents on these locations.

Mr. Gilpin was, however, given an approved plat of the official survey, of this tract number 4, as evidence of title, in connection with the act of Congress aforesaid, and his purchase from the heirs.

In determining the various questions involved in the case, this office on March 21, 1879, decided that the character of the land involved had already been determined, and the matter therefore, was *res adjudicata*.

"The question as to the mineral or non-mineral character of this land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals. This office has no authority to reopen the question. The land can no longer be regarded as a part of the public domain," &c.

The case has, therefore become final so far as this office is concerned; and unless authorized to do so by some superior authority, I cannot recognize entries, or filings, as established by the approved survey thereof.

Very respectfully, W. M. STONE,
Acting Commissioner.

Certified by the Commissioner of the General Land Office, under the seal of said office, the 27th day of April, 1894.

127 Mr. VAILE: If the court please, in view of the fact that the actual survey on the ground had not been made for the mountainous portion of the northeast corner, and there were questions with settlers as to just where that line was on the grant, a "completion survey," as it was called, was made in 1892; I first offer in connection with that the instructions given by the Government to the surveyor for the Darby survey.

Counsel for defendant objected to all the evidence pertaining to the Darby survey, which was made in 1892, for the purpose of closing up this gap.

Mr. VAILE: For the purpose of marking on the ground the lines.

Mr. SMITH: The objection is that this Darby survey took place in 1892, and was made long after the inception of our rights, such as they were, a matter in which we had no control or part in any manner, and it cannot operate to extend or affect in any manner the extent or character of the grant which may have been made by the Government prior to that time.

Mr. VAILE: I do not propose to offer anything but the instructions and a little in relation — the northerly boundary, to show the nature of the land.

Whereupon counsel for plaintiff read the portions of said instructions offered, and the same were then received in evidence and marked Exhibit No. 33, and are as follows:

(EXHIBIT No. 33.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
DISTRICT OF COLORADO, DENVER, COL., *Oct.* 18, '92.

Special instructions to Thos. L. Darby for the completion of the survey of the north and east boundaries of the Luis Maria Baca Grant No. 4, in Saguache county, Colorado.

SIR: You are hereby detailed for the special work of protracting the east and north boundaries of the grant, so as to locate and mark on the ground, the northeast corner of said grant, and the portions of the east and north boundaries left unsurveyed by A. Z. Sheldon, in October, 1863.

Copy of the notes of the survey of the grant and of the east boundary of t'p 41 N., R. 12 E., also a diagram showing in
128 black lines what is surveyed, and in red lines what needs to be surveyed, accompany these instructions.

You will begin with identifying the locus of the southeast corner of the grant. If any doubt exists as to its true position, or if the corner is missing, you can re-establish its true locus by retracing the east boundary of t'p 41 N., R. 12 E., which line appears to have been carefully run and closed upon the south boundary of the grant 1.58 chains west of said S. E. corner of the grant.

Thence from said point, retrace the east boundary from southeast corner to the 13th mile post, set by Sheldon, 4 miles 7.12 chains north of said S. E. corner, and where corners are missing, re-establish them.

Thence from the last identified corner on said east boundary, run meridian line by chaining, when possible, and by triangulation when chaining is impossible or impracticable for close work.

Set ½-mile and mile corners, when such corners can be perma-

nently placed and besides, build on the line in gulches and on prominent mountain ridges, monuments alongside a stone set in ground or mound marked E. B. B. G. and give in your notes, the distance of such monuments to nearest set mile or half-mile corner.

Proceed in this manner until you have extended the east boundary for eight miles, 29.32 chains northerly of the locus of the 13th mile post of the Sheldon survey.

Thence identify the locus of the initial corner of the grant set by Sheldon on north boundary of grant and retrace the north boundary easterly to the 2nd mile post as set by Sheldon.

Thence from the last identified corner on said north boundary east of initial corner, run a parallel marking said line on the ground by ½-mile and mile corners until you intersect the extended east boundary and place at the point of intersection on a corner marked for northeast corner of grant.

In case the true locus for northeast corner is inaccessible or falls on a precipitous side of the Crestone mountains, or in a deep gorge, place and mark witness corners for northeast corner of grant as near its locus as possible on the north boundary as well as on the east boundary line of the grant.

If the surveyed portion of the boundary lines by Sheldon have been run and chained correctly, as I have every reason to
129 admit, you will find the point of intersection at 2 miles 35.45 chains east of the locus of the 2nd mile post east of initial corner set by Sheldon.

This would make the grant a square of 13′ 39½″ extent in longitude and 10′ 50¼″ extent in latitude at a mean latitude of 37° 54′ 36″, containing 154.9446 square miles or 1.306 square miles less than 100,000 acres.

If for that reason you find the distance from the initial corner to the point of intersection for northeast corner less than 4 miles, 33.93 chains, move the corner set for N. E. corner to that distance east of initial corner and correct your east boundary line by moving the corners and monuments on a true line between finally located N. E. corner and S. E. corner of grant.

If you find, however, said distance longer than 4 miles, 33.93 chains, you need not correct the east boundary unless it exceeds 12 chains said length of 4 miles, 33.93 chains, because an excess of 12 chains on north boundary would make up the difference between 156.25 square miles and 154.94 square miles.

Make field-notes of your survey in the usual form, and not omit a single detail necessary to make these notes complete and full.

The work requires great care, and where chaining can be executed, a double set of chainmen. The retracing and re-establishing of described portions of the north and east boundaries and the extending of the portions of said boundaries not yet established is assimilated with standard lines for which is allowed by law, a rate of $9 per mile, and when mountainous, heavily timbered, or covered with dense undergrowth, $13 per mile. You will be paid at these rates, but your account must not exceed $225.

The liability of this work will be charged to the apportionment

to Colorado, of the appropriation for public surveys, for the fiscal year ending June 30, 1893.

Respectfully,

E. C. HUMPHREY,
Surveyor General.

Thereupon counsel for plaintiff offered in evidence the plat of the completion survey, which was received in evidence and marked Exhibit No. 34, and is included in the order of certification hereinafter set out.

Counsel for plaintiff next offered certain portions of the field-notes of the survey which was made pursuant to these instructions,
130 at page 29 of the certified copy of the field-notes, for the description of the land east of the initial corner, in the Darby notes.

Mr. VAILE: For the first mile east of initial corner.

(Reading:) "Pits impracticable, ground frozen, ground rugged and rocky." For the second mile east of the initial corner description of the land "mountainous and rocky, excepting the little park which contains from 40 to 50 acres, which was probably once the bed of a lake formed by glaciers, timbers, spruce, pine and aspen." At the end of the next mile, "impossible to take any witnesses; offsets were made to avoid bluffs, and very heavy slide rock." That is the end of the third mile east of the initial corner, which is probably far enough for the present purposes of these field-notes.

If the court please, there is a statute of the United States which makes a part of every contract for the survey of public lands, or did during this period, a manual issued by the Commissioner of the General Land Office, bearing date February 22nd, 1855, so that it becomes a part of the statutes of the United States, and I want to offer a portion of that manual.

By the act of Congress of May 30th, 1862, which was nearly a year after this grant was made, I mean after the act of Congress under which our rights are claimed. The act reads as follows: "The printed manual of instructions relating to public surveys, prepared at the General Land Office and bearing date February 22nd, 1855, the instructions of the Commissioner of the General Land Office, and the special instructions of the surveyor general, when not in conflict with said printed manual, or the instructions of said Commissioner, shall be taken and deemed to be a part of every contract for surveying the public lands of the United States. (12 Stats., p. 409.)

Under that I offer certified copy of the manual referred to of February 22nd, 1855, certified by the Commissioner of the General Land Office, for the purpose of showing the form of certification required for surveys, and by negative testimony that it does not require any approval by the Commissioner in form.

I suggest to counsel and the court that this book may be considered as an original exhibit, not be copied into the record, that it may be certified up as an original exhibit.

The COURT: I suppose so; read the part that you want to put into the record, and it is not necessary to put in both.

Mr. VAILE: I wish to read from page 25 of the manual, page 69, and then the certificate on diagram B.

131 Mr. SMITH: If the court please, so far as the act which counsel reads, making a part of the statutes, I do not understand that is the effect given to them at all; it is especially required, it is part of the contract. I concede, however, they may be of interest, as showing the rules under which these surveyors acted, inasmuch as there is no conflict about what was done, or about the survey. The serious objection I have to them is the incumbering of the record with so many maps and plats.

Mr. VAILE: I am very sorry it is necessary, but I want to make it complete while I am at it.

The COURT: Put it in, sir.

Whereupon counsel for plaintiff offered in evidence from the said manual issued by the surveyor general under date of February 22nd, 1855, certain passages and forms of certificates, which were admitted in evidence and marked Exhibit No. 35, and are as follows:

(EXHIBIT No. 35.)

"The original field books, each bearing the written approval of the surveyor general, are to be substantially bound into volumes of suitable size, and retained in the surveyor general's office, and certified transcripts of such field books (to be of foolscap size) are to be prepared, and forwarded from time to time to the General Land Office."

(Page 25.)

"To each of the original field books the surveyor general will append his official approval, according to the following form, or so varied as to suit the facts in the case.

SURVEYOR'S OFFICE AT ——, ——, 18—.

The foregoing field-notes of the survey of (here describe the survey) executed by Robert Acres, under his contract of the — day of ——, 18—, in the month of ——, 18—, having been critically examined, the necessary corrections and explanations made, the said field-notes, and the surveys they describe, are hereby approved.

A. B.,
Surveyor General."

(Page 69.)

"The above map of township No. —, — meridian ——, is
132 strictly conformable to the field-notes of the survey thereof on file in this office, which have been examined and approved.

Surveyor general's office at ——, ——, 18—,

—— ——, *Sur'r Gen'l.*"

(Diagram B.)

Further to maintain the issues on his part, the plaintiff introduced oral testimony as follows:

ALBINUS Z. SHELDON, a witness produced on behalf of the plaintiff, testified as follows, after being duly sworn:

Direct examination.

By Mr. VAILE:

Q. Mr. Sheldon, state your name to the jury.
A. Albinus Z. Sheldon.
Q. Where do you live, Mr. Sheldon?
A. I live in El Paso county.
Q. Mr. Sheldon, what is your age?
A. I am 69 years old.
Q. Mr. Sheldon, have you been, during much of your life, following the business of surveying, or civil engineering?
A. Some 30 odd years I have been engaged in the business.
Q. Are you the Albinus Z. Sheldon who made an official survey of Baca Grant No. 4, in the autumn of 1863?
A. I am; yes, sir.
Q. Mr. Sheldon, were there any public surveys extended over the country prior to your going into it for the purpose of this survey?
A. I think not, sir; I was not aware that there was.
Q. Was the country much inhabited, or was it otherwise?
A. Otherwise.
Q. The call for the description of the ground which you were to survey, the selection of lands as to starting point, reads substantially in this way: Commencing at the eastern edge of the valley of San Luis at a point where the 38th parallel of latitude crosses the base of the snowy range dividing the waters of the Arkansas and the Del Norte rivers. Was this substantially your recollection of the reading?
A. That is my recollection.
Q. Mr. Sheldon, did you study the country and the locality of the 38th parallel of latitude, and where the range of mountains reaches the valley, before establishing the initial point?
133 A. Quite faithfully, sir.
Q. After a study of that country, Mr. Sheldon, I will ask you to state whether or not it was practicable, the country being as it was, for a competent surveyor to find on the 38th parallel of latitude the point on the eastern edge of the valley where that parallel crossed the base of the range?
A. I do not think it was a serious difficulty.
Q. You think, then, it would be practicable to find it?
A. I do; yes, sir.
Q. Did you find it?
A. I satisfied myself.
Q. Did you locate the initial corner of this grant at the eastern edge of the valley at the base of the range, and on the 38th parallel?
A. What I consider to be the base of the range.
Q. You may state whether, in your judgment as a surveyor, any

other competent surveyor with the same call, could from the topography of the country as it exists there, find the point also?

Objected to by counsel for defendant as not material.

The COURT: I do not think you can ask that.

To which ruling of the court counsel for plaintiff then and there duly excepted.

Q. You may state, Mr. Sheldon, what general considerations, as you now remember it, determined your action in fixing the initial corner at the place you did?

A. The general consideration, that is, the general conformation of the surface of the country and the trend of the mountains. I would say further, that in the neighborhood of the 38th parallel the mountains rise very abruptly, and it occurred to me it was a matter of very little difficulty to approximate the base of the mountains at that point.

Q. Do you think that any other point on the 38th parallel, east or west of the point as selected, would be as accurate a location of the call as the point you selected?

Objected to by counsel for defendant.

Which objection was by the court overruled.

To which ruling of the court, said defendant by counsel then and there duly excepted.

A. I do not.

Q. Considering the general trend of the mountain range in that locality, you may state whether the 38th parallel of latitude, which you had to follow, would ascend the range diagonally or at right angles to its trend?

134 A. Well, according to my recollection—it must be remembered it is some thirty-two years ago,—as we followed the 38th parallel we crossed a spur or ridge running down from the mountain, running southwesterly, and from the initial corner we would ascend that spur; if that is a satisfactory answer.

Q. Then the line of steepest ascent from the initial corner, would that be along the 38th parallel of latitude, or would it be in a diagonal course from the initial corner?

A. It would be northeasterly.

Q. After establishing the point where the initial corner, in your judgment, as a surveyor, should be, did you mark and designate it in some way?

A. Yes, sir; I marked it "I. C." upon a certain monument there.

Q. A stone monument?

A. Yes, sir.

Q. You marked it "I. C." for initial corner?

A. Yes, sir.

Q. You may state whether you marked witness trees in any way if you remember now?

A. It is impossible now for me to remember, if I did not mention witness trees in my field-notes I did not mark them.

Q. But you did establish a monument?

A. I established a monument.

Q. Your field-notes show that you went easterly some little distance through a country which you describe in your field-notes as mountainous and rocky, did you establish some monuments for each mile, and every half mile, as far as you extended east?

A. Every half mile as far as I extended, except at the close of the line where we were obstructed by the inaccessibility of the mountains; I think we marked a large rock there.

Q. That already existed?

A. In position.

Q. And after having gone up into the mountains, and found, as your field-notes show, that it was inacces ible, you returned to the initial corner and went westerly along the north corner of the grant?

A. Yes, sir.

Q. You may state whether at that time, 1863, you marked that north boundary with monuments from the initial corner westward?

A. I did.

Q. Every half mile?

A. Every half mile.

Q. And so continued around the grant?

A. Yes, sir.

135 Q. Did you mark the entire west side by monuments?

A. Yes, sir.

Q. And the entire south side?

A. Yes, sir.

Q. And the east side from the southwest corner to the mountains or up into the mountains?

A. To the point where we abandoned the work on account of the severity of the winter.

Q. Was the mountainous country at that time covered with snow?

A. Yes, sir.

Q. Do you remember at any time in any subsequent years being on the grant, and seeing the initial corner again?

A. I am not prepared to swear positively about that; I know I was on the grant and visited several points, but my recollection does not serve me as to whether I visited the initial corner.

Cross examination.

By Mr. SMITH:

Q. Mr. Sheldon, how far east from the initial corner was your camp, where you first camped before starting upon your survey?

A. According to my recollection it was west of the initial corner.

Q. How far west?

A. I cannot answer that, sir; I think my field-notes will show very closely where I camped; I commenced going north of my camp before establishing the north line of the grant, and from that I set the initial corner of the survey; I don't remember.

Q. Do you recall what the character of the surface was as to timber about the initial corner, in the neighborhood of the initial corner?

A. Well, I really can't answer the question at the present time; it occurs to me there was scattering timber about there; I don't remember so as to answer definitely.

Q. Do you remember whether the initial corner was set near a stream or not?

A. I think it was not far from a small stream.

Q. Was it in a level piece of ground or upon the side of a hill?

A. It is my impression that it is a little above the level piece of ground, I could not say how far. Of course those little details are very difficult to recall after thirty-two years.

Q. Undoubtedly. Do you remember whether or not you went north or northeast from the initial corner, at all?

136 A. The line which we were running ran due east, it was intended to run due east.

Q. Do you remember whether while you were there you investigated the country to the north and northeast of the initial corner?

A. Yes, sir, I remember that I went over the ground on both sides.

Q. For how far a distance?

A. I suppose I was on the north side a mile north of the initial corner, perhaps more; and I also went south to some extent. I don't recall how much. My object in doing that was to obtain the general trend of the base of the mountains.

Q. You were endeavoring to ascertain where the base of the mountains was?

A. Satisfactorily to myself, yes, sir.

Q. Was there, or was there not a marked and distinct change in the character of the surface at the point where you placed the initial corner?

A. I think at the point where I made the corner, that the rise commenced increasing a little more abruptly than it had been doing before reaching the initial corner.

Q. Was there any change in the character of the timber or vegetation at that point, or near it?

A. I am unable to answer that question, sir.

Q. At whose request and direction did you make that survey, Mr. Sheldon, if you remember?

A. I made the survey under instructions from the surveyor general. Governor Gilpin brought the instructions from Denver to me at Colorado City; he had signed them himself and I also signed them, and duplicate copies also, and having signed the papers I proceeded under those instructions.

Q. Did you have any conversation with ex-Governor Gilpin with respect to investigating the mineral or non-mineral character of that land?

Mr. VAILE: I submit to the court whether that is cross-examination; we have not had any question about conversations.

The COURT: I do not think you can ask for conversations.

Q. Was Governor Gilpin with you when you made this survey?
A. He was.
Q. Upon the grant?
A. Yes, sir.
Q. Did he assist you, or take any part in the determination of where this initial corner was to be?
A. Not the slightest, except that he acted as flagman.
Q. You determined that from your own observations and study?
137 A. I determined that from my own judgment, sir.
Q. How large an area of territory did you personally examine in determining where the base of the snowy range was upon the 38th parallel?
A. Why, I should say I traversed the grant line north and south in the neighborhood of a mile and three-quarters, perhaps more than that; I know I was north of the initial corner and was south of it. Of course I can't say, it is simply an estimate, I didn't measure the distance.
Q. Now, Mr. Sheldon, will you state to the jury what special and controlling feature there was, if any, which caused you to determine that this particular point was the base of the snowy range?
A. Well, the leading feature was the general trend of the base of the mountains; that was the leading feature at that special point; the apparent increase in the rise of the ground was a secondary one, but the general trend of the base of the mountains, which is very easily determined I apprehend there, was the controlling point that we had in establishing the point.
Q. What do you mean by the "general trend of the base of the mountains," Mr. Sheldon?
A. I mean that course which would be traversed by any line marking the base of the range. Part of my instructions was to give the bearing of that trend; I think that is included in my field-notes. It was desirable to get that as accurately as possible.
Q. In your field-notes you report that the trend of the mountains is north 32 degrees west.
A. Yes.
Q. By that you mean the general course of the range, do you not?
A. I mean the general course of the base of the range. I was not on the summit of the mountain, and therefore cannot determine the trend of the summit.
Q. Now, Mr. Sheldon, will you please state to the jury what you consider the base of the mountain; what it was that you found?

Mr. VAILE: That is hardly a pertinent question in this connection; it was the base of the range, and not the mountain.
Mr. SMITH: I will change it to the base of the range.

A. Well, I should answer generally in this way: The mountains are constituted mainly of rock, and with a pitch downward into the

adjoining country, and that point at the base of the mountains where that pitched would naturally be the bottom of the
138 mountains, what I consider the base; of course there may be deposits, glacial deposits perhaps, running further out; these mountains are destitute of foot-hills as you find them in this neighborhood; the mountains stand out quite boldly next to the valley, and from my opinion of that, it is a matter of very little difficulty to determine quite approximately what the base of the mountains is at that point.

Q. Can you state what the grade, what the fall of the mile of ground east of the initial corner was?

A. No, sir.

Q. Have you any recollection about it?

A. No, sir, I have not. I made no estimates of the grades while I was there, merely an estimate of the eye, a general observation of the surface.

Mr. Z. T. DUVAL, a witness produced on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct examination.

By Mr. VAILE:

Q. Mr. Duval, please state your full name to the court and jury.

A. Z. T. Duval.

Q. Where do you live, Mr. Duval?

A. In Denver.

Q. What is your business?

A. Civil engineer.

Q. How long have you been in the business of a civil engineer?

A. About nineteen years.

Q. Have you been in the constant practice of your profession for about that length of time?

A. Yes, sir.

Q. Have you had occasion recently to examine the country in the vicinity of the point that is marked as the initial corner of Baca Grant No. 4?

A. Yes, sir.

Q. When did you make an examination of that vicinity?

A. On the 9th, 10th, and 11th of this month.

Q. You were there then, three days, thus engaged in this examination, were you?

A. Yes, sir.

Q. Who were with you?

A. Mr. Darby.

Q. Is Mr. Darby also a civil engineer?

A. Yes, sir.

Q. And did you go there to make this examination?

A. Yes, sir, a general survey of the ground.

139 Q. I will ask you to state whether in making this examination you went over any lines for the purpose of taking levels, and with a view of making profiles of the lines you traversed?

A. Yes, sir.

Q. Did you establish levels upon the north boundary of the Baca grant east and west of the initial corner?

A. Yes, sir.

Q. I call your attention to a plat which we shall have occasion to use for another purpose in a few minutes, and will call — Exhibit 36; I will ask you to state, assuming that the initial corner is the place marked "initial corner" upon this plat, and that the top of the plat is north, and the right hand east, I will ask you if the line A A would represent the north boundary of the ground that you traversed?

A. Yes, sir.

Q For about what distance west of the initial corner did you take levels upon that line?

A. Two miles.

Q. For about how far east of the initial corner did you take levels?

A. Something over a mile.

Q. I call your attention to the line marked B B on this plat; will you state what that line B B is?

A. A diagonal line running through the initial corner; it is what we designate as a diagonal line through the initial corner.

Q. State what was the reason for selecting that line as a line of profile.

A. To show the slope of the ground each side of the initial corner.

Q. You may state whether or not it shows the course of steepest ascent to the mountains, the shortest ascent to the mountains from the initial corner.

A. It does.

Q. The mountains being in what direction from the initial corner along that line?

A. Northeast.

Q. And as that line goes southwest into what sort of country does it open up?

A. It gets flatter as it goes to the southwest.

Q. Did you take other profiles, and other lines?

A. Yes, sir; a mile north of that.

Q. The line marked on this plat "D D"?

A. Yes, sir.

Q. Was that line parallel with the north boundary of Baca grant?

A. Yes; one mile distant.

140 Q. At what point did you commence your profile upon that line, taking the western terminus?

A. This point is one mile north of the 48-mile post, and 16.62 chains east of the 48-mile post.

Q. And you found that was practically a quarter corner section?

A. Yes, sir.

Q. From there did you take the profile easterly?

A. Yes, sir.

Q. How far easterly were the profiles taken, about?

A. Something over a mile east.

Q. From that line did you take any profile in a diagonal course for any distance?

A. Yes, sir, at station 51.

Q. Which is marked upon this map point "E"?

A. Yes, sir.

Q. I see a line marked "E E", on this map. Is that the course of that other profile?

A. Yes, sir.

Q. How far did you go in taking levels on that?

A. I got pretty near 800 feet.

Q. In the direction indicated by the line on the plat?

A. Yes, sir.

Q. I will ask you to state whether at any of these places vertical angles were taken for the slope of the mountain?

A. Yes, sir.

Q. Did you take any other line of profile?

A. One mile south of the north boundary.

Q. Was that line of profile parallel with the north boundary of the grant?

A. Yes, sir.

Q. Line marked on the plat "C C"?

A. Yes, sir.

Q. About what place did you commence for the west terminus of that profile, in a general way?

A. In the center of section 5.

Q. Well, it is between the 49-mile post and the initial corner?

A. Yes, sir.

Q. And about a mile south?

A. Yes, sir.

Q. How far east did you run that?

A. A mile and three-quarters, I think it was.

Q. I will ask you to state whether this plat, which we will designate as Exhibit 36, I observe that it locates certain creeks; I will ask if they are correctly located where they cross the lines that you took?

A. Yes, sir.

141 Q. For instance, Trois Tetons, or South Crestone creek, crosses the Baca Grant north line some distance east of the initial corner, does it not?

A. Yes, sir.

Q. The North Crestone creek crosses the Baca Grant line something over a mile west of the initial corner?

A. Yes, sir.

Q. There is a creek, I see, which your mile south strikes in its course easterly; what is that creek?

A. Willow creek.

Q. Willow creek; and the mile north at the station 51, or close to it seems to cross a creek; is that the North Crestone creek?

A. Yes, sir, that is the North Crestone creek.

Q. Have you made profiles to illustrate the levels along these lines of observation?

A. Yes, sir.

Q. Mr. Duval, in making profiles for the purpose of determining elevations on the earth's surface for long distances, is it customary to make them on the same scale for the vertical as for the horizontal, or differently?

A. A little different.

Q. And for what purpose?

A. To show up the inequalities of the surface.

Q. Which it would not do on the natural scale?

A. No, sir.

Q. I call your attention to a map, or profile, which we will mark Exhibit 37; on the lower part of this I see a profile marked "natural scale," and then, "one inch represents 400 feet." That is upon a scale where the vertical and the horizontal are both upon the same scale, is it?

A. Yes, sir.

Q. What does that line represent upon that natural scale?

A. It represents the north parallel of this Baca grant.

Q. I see above it, separated from it, a yellow tinted line. What does that represent?

A. That is the diagonal line through the initial corner.

Q. Is that also made on the natural scale?

A. Yes, sir.

Q. Same scale vertical as horizontal?

A. Except this point (indicating) is raised up.

Q. It is put on there separately?

A. Yes, sir.

Q. And from one end to the other it represents the natural scale, does it?

A. Yes, sir.

Q. I see besides upon this exhibit two others. I will ask you to state what they are; first that which is tinted in brown?

142 A. That is the north boundary of the Baca grant.

Q. What is the scale upon which that is made?

A. That is 400 feet horizontal, and 125 feet vertical to the inch.

Q. In other words, it is magnified so as to show the inequalities and changes in the surface?

A. Yes, sir.

Q. What is the other, yellow, tinted line at the upper part of this map?

A. That is the diagonal line through the initial corner.

Q. Is that magnified in the same way on the same scale?

A. On the same scale, yes, sir.

Q. Mr. Duval, taking the diagonal line you made in this upper sketch, does it use the same base, the same datum plane of elevation, that the east and west line on the north line of Baca grant uses?

A. Yes, sir.

Q. So that they are drawn to represent the relative elevation of the one line in relation to the other?

A. Yes, sir.

Q. Where do they touch?
A. At the initial corner.
Q. As they go eastwardly which line rises the more rapidly?
A. The diagonal line rises the more rapidly.
Q. As they go westwardly which line falls the more rapidly?
A. The north boundary line.
Q. Where is the point on the diagonal line of greatest flattening?
A. Down here, westerly.
Q. Where is it in reference to the initial corner; is it east or west of the initial corner?
A. It is west of the initial corner.
Q. I will ask you to state if it is not almost at the initial corner?
A. It is a distance away from it 100 feet.
Q. This is accurately drawn upon the scale which it purports to have, is it not?
A. Yes, sir.

Whereupon plaintiff's counsel offered in evidence said map marked "Exhibit 37," and the same was received, and is covered by the order of certification hereinafter set out.

Q. I see upon this are marked certain altitudes. Are those absolute altitudes above sea-level, or assumed altitudes?
143 A. Assumed altitudes.
Q. What was the altitude assumed for the datum level?
A. 7,800.
Q. 7,800 feet at the 48th mile post?
A. Yes, sir.
Q. And from there the altitudes are given from that basis?
A. Yes, sir.
Q. And the distances by stations of a thousand feet, are they?
A. Yes, sir; horizontal.
Q. I will ask you if you have made profiles in a simi-ar way of the various lines upon which you took the levels?
A. Yes, sir.
Q. I call your attention to Exhibit 38, and ask you whether upon that the same profiles for the Baca grant through the initial corner north boundary and the diagonal line, are shown?
A. Yes, sir.
Q. You may state whether the profile for the line one mile south is shown?
A. Yes, it is.
Q. And at Willow creek?
A. Yes, sir.
Q. I will ask you whether the profile for the line one mile north is shown?
A. Yes, sir.
Q. I see, however, two lines which form the eastern part of that rising upwardly rapidly. What was the occasion of the two lines?
A. That where they commenced there shows the slope of the mountain, from the end of the line we run, by vertical angles.

Q. The one marked east is the vertical angle on the direct line you were traversing?

A. Yes, sir.

Q. And the one marked north 30 degrees, 20 minutes east; what is that?

A. An angle taken from the east line, showing the slope of the mountain.

Q. An angle from the east line was it?

A. Yes, sir.

Q. I see north of that some yellow tinted lines, do they represent in a similar way the slope of the mountain?

A. Yes, sir.

Q. Where were they taken, state on Exhibit 36 where those are taken?

144 A. The angle starts from station 51 and runs 800 feet northeast, and then the angles are taken there which are represented here (pointing on the map).

Q. Are these upon the scale which they purport to have?

A. I think they are.

Q. You have them marked upon these, the actual scale to the inch, both horizontal and vertical?

A. Yes, sir.

Whereupon counsel for plaintiff offered in evidence said map marked Exhibit 38, and the same is covered by the order of certification hereinafter set out.

Q. Mr. Duval, I want to ask you about some other features of this matter (calls attention to a (past-board) model of this mountainous country referred to) have you examined this model which I produce before you?

A. Yes, sir.

Q. Please state whether the various lines of card-board do or do not represent the lines of profile which you took?

Objection by counsel for defendant, that the witness should state the lines of profile.

Mr. VAILE: I speak of them in general.

Mr. SMITH: Whether these represent it actually or exaggerated

Mr. VAILE: This model purports to show the horizontal 660 feet to the inch, and the vertical scale 200 feet to the inch.

Q. I will ask you whether you have checked it over to see whether or not, on that scale, it fairly represents the country, according to the observations which you made upon the ground?

A. It does.

Q. Upon taking this model I find that a line stretched from Willow creek to station 51 crosses through the initial corner; I will ask you to state whether from your observation of the base of the range that fairly or correctly represents the trend of the base of the range for those two miles and more?

A. It does.

Q. State whether at Willow creek the ascent is rapid or gradual, the slope of the mountain from Willow creek?

Objected to by counsel for defendant as immaterial. That is considerable over a mile and a half from the initial corner.

The COURT: He can answer; he is getting at the general line.

145 A. I think it does correctly represent it.

Q. And at Willow creek does the mountain rise abruptly from the creek?

A. Eastwardly it does.

Q. At station 51, you may state whether there is any sudden change of grade on the east side of Crestone creek?

Mr. SMITH: What do you mean by station 51?

Mr. VAILE: He has already located station 51.

Mr. SMITH: A station fixed by himself?

Mr. VAILE: Certainly. It is on this line a mile north of Baca grant, and just on the eastern bank of Crestone creek on the line running parallel with the north line of Baca grant.

Q. You may state whether in that vicinity there is a sudden rise?

A. There is.

Q. I will ask you to state whether at the end of the point 800 feet northeasterly from station 51 there is any sudden abrupt ascent of the mountains?

A. There is.

Q. Now, have you with you the notes, your notes of the levels which you took?

A. Yes, sir.

Q. First, before asking you for them, I will ask you to state in a general way whether the Baca Grant north boundary ascends the mountains in their steepest course, or ascends them diagonally?

A. Ascends them diagonally.

Q. You numbered your stations as you went along?

A. Yes, sir.

Q. What is your station at the initial corner?

A. 105, plus 80 feet.

Q. By your notes each station was 100 feet from the preceeding one?

A. Yes, sir.

Q. So it would mean 10,500 feet plus 80, from your starting point, is that right?

A. Yes, sir.

Q. Upon your profiles I call your attention to the part immediately west of the initial corner and on the brown outline, which you have stated marks the north boundary of the grant. I will ask you to state whether right at the initial corner, just west of it, between that and station 105, in the 80 feet there, there is any sudden change?

A. There is.

Q. Is it correctly marked upon this profile?

146 A. Yes, sir.

Q. Within the 80 feet that separates station 105 from the initial corner is it?

A. It is; yes, sir.

Q. Mr. Duval, from your notes I wish you would state what the average fall per hundred feet is, west of the initial corner, for the first thousand feet. From station 105 westwardly for a thousand feet what is the average fall per hundred feet?

A. It is eight feet.

Q. What is it for the second thousand feet taken by itself?

A. West?

Q. West from the initial corner.

A. It is eight feet.

Q. What is it for the third thousand feet taken by itself, west from the initial corner?

A. $8\frac{2}{10}$.

Q. Then for the three thousand feet from station 105, which is within 80 feet of the initial corner, there is a regular steady slope of eight feet in a hundred, is there?

A. Westwardly; yes, sir.

Q. What is it when it gets out into the prairie, do you remember?

A. No, sir.

Q. Well, take it at mile post 49, in that vicinity, take the next thousand feet.

A. $4\frac{4}{10}$.

Q. Four and four-tenths at that 49-mile post?

A. Yes, sir.

Q. The fall is still to the west, is it?

A. Yes, sir.

Q. Now, Mr. Duval, for the first thousand feet east of the initial corner what is the rise along this line which, as you say, ascends the range diagonally, for the first thousand feet from the initial corner, what is the rise per hundred feet? I am not speaking of the diagonal line, but right along the Baca Grant line.

A. $8\frac{3}{10}$.

Q. What is it for the second thousand east?

A. $10\frac{1}{10}$ feet.

Q. What is it for the third thousand?

A. $14\frac{2}{10}$ feet.

Q. From there on, the mountain ascends quite rapidly, does it not, Mr. Duval?

A. Yes, sir.

Q. Now, Mr. Duval, taking the diagonal line we have mentioned which cuts through the initial corner in the steepest course of the mountain, I will ask you to state what the average fall is for

147 the 400 feet towards the valley; that is, from the initial corner measured upon that diagonal line for the first 400 feet southwest from station zero to station 4?

A. $30\frac{1}{10}$, the total fall.

Q. What I want is the fall per hundred in those four hundred feet?

A. 7½ feet.

Q. What is the rise in the first four hundred feet going northeast, according to the notes of yourself and Mr. Darby?

A. It is 408 feet to this first station northeast. The rise is $40\frac{3}{10}$.

Q. For the four hundred feet?

A. Yes, sir.

Q. How much is that per hundred?

A. $10\frac{1}{10}$.

Q. Then from the initial point southwesterly for 400 feet the fall is what?

A. 7½.

Q. From the same point northeasterly the rise is $10\frac{1}{10}$ feet in a hundred?

A. Yes, sir.

Q. How far does the rise of about 10 feet in a hundred continue on that line, approximately?

A. I cannot tell except by my profile (looks at profile)—about a thousand feet.

Q. From there, from the end of that thousand feet, what is the rise per hundred feet along the next three or four hundred feet?

A. In the next three hundred and sixty-six feet it rises 88 feet.

Q. How much is that per hundred? Does it rise about 24 feet in a hundred?

A. Yes, sir.

Q. Rises 24 feet in a hundred from there up?

A. Yes, sir.

Q. You may state whether the mountain rises abruptly from that portion of the country?

A. It does.

Mr. SMITH: I desire to ask counsel what portion of the country he referred to in that question?

Mr. VAILE: I had already stated; he has taken us to a point a thousand feet northeast of the initial corner, and from there the grade is 24 feet to the hundred, and further on the mountain rises abruptly.

148 Q. In taking your profile for the mile north of the initial corner, you may state what sort of a country it is you traversed before you reached Crestone creek in going eastwardly upon your line of profile, being on the line D D upon Exhibit 36?

A. As to the slope?

Q. Yes; the general country.

A. It had a uniform slope from the quarter corner until it reached the Crestone creek.

Q. Does this model fairly represent the contour of the surface for that distance upon the line D D west of the Crestone creek?

A. Yes, sir.

Q. At station 51 you took a course diagonally for eight hundred feet?

A. Yes, sir.

Q. That is along a road, is it not?

A. Yes, sir.

Q. That is along a road at the side of the creek, is it not?

A. Yes, sir.

Q. What is the rise for that 800 feet, or the rise per hundred feet for the 800 feet from station 51, the northeast 800 feet?

A. It is $51\frac{2}{10}$ feet.

Q. In the 800 feet?

A. Yes, sir.

Q. Making a rise of about how much per hundred feet along the road there?

A. Something over 10 feet.

Q. Exactly?

A. No; not exactly.

Q. I will ask you to state whether at that place there is an abrupt rise in the mountains?

A. There is.

Q. You may state whether the model fairly represents, at the point marked "E" at the end of the 800-foot line, the abrupt rise of the mountain at that place?

A. It does.

Q. Mr. Duval, in the neighborhood of the initial corner where the diagonal line is drawn, what is there, if anything, in the nature of any ridge of the mountain coming down to this point?

A. There is a ridge coming down from the northeast.

Q. Is that upon the line which I now indicate, which is the line B B upon the model?

A. Yes, sir; it is.

Q. From you- examination of this country at the vicinity of the initial corner, the country a mile south of it, the country a mile north of it, and the country east and west of it, and northeast and southwest of the initial corner, I will ask you to state whether,

149 in your opinion as an engineer, or whether you, as an engineer going upon that land with this sort of a call, could locate your point of starting; that is, assuming for the purpose of my question that the north boundary of the Baca grant is on the 38th parallel of latitude, east and west?

A. Yes, sir.

Q. Commencing at a point on the eastern edge of the San Luis valley where the 38th parallel of latitude crosses the base of the snowy range dividing the waters of the Arkansas and Del Norte rivers, with your knowledge now of the ground, could you as a surveyor, locate that point?

A. Yes, sir.

Q. Where would you, as a surveyor, locate it with reference to the point which is now claimed as the initial corner?

A. I should have located it there.

Cross-examination.

By Mr. SMITH:

Q. Mr. Duval, you went there at the request of the plaintiff and their counsel, I presume, to make this survey?

A. I did, yes, sir.

Q. Was the initial corner pointed out to you?

A. Yes, sir.

Q. This model to which your attention has been called, Mr. Duval, of card-board, did you prepare it?

A. No, sir.

Q. Do you know upon what scale it shows the altitude?

A. Yes, sir.

Q. What scale is it?

A. 200 feet vertical and 660 feet horizontal. I simply checked it over after it was made.

Q. Is it the same scale which is shown upon the plat which you have here?

A. No, sir.

Q. What is that scale as compared with it?

A. That is 125 feet vertical and 400 horizontal.

Q. Which is the greater, that or this; which is the farther departure from the true scale?

A. That is over here (points to model).

Q. How much more does that depart from the true scale than this exaggerated line does?

A. This is the true scale, and this other is the exaggerated scale.

Q. Now, I understand you, Mr. Duval, that this scale along here represents the true contour of the surface of the ground along the north line of Baca grant?

A. Yes, sir.

150 Q. And that this point here marked "initial corner" is the initial corner of the grant?

A. Yes, sir.

Q. Have you made an estimate of what the rise is in the first mile?

A. West?

Q. East. In the first 1,000 feet there is a rise of eight feet in a hundred?

A. Yes, sir.

Q. And in the second thousand feet a rise of $8\frac{3}{10}$ feet going east?

A. Yes, sir.

Q. Are those the figures which you gave?

A. The first thousand feet is $8\frac{3}{10}$.

Q. Just state in respect to the second thousand.

A. It is $11\frac{1}{10}$ feet.

Q. These little black squares in this plat, what do they represent in feet?

A. 100 feet horizontally and 20 feet vertically.

Q. I am speaking now wholly of the natural scale.

A. I think it represents a hundred feet each way of the natural scale.

Q. Now, can you tell us, Mr. Duval, what the total rise is in the first mile east of the initial corner?

A. $678\frac{1}{10}$ feet rise.

Q. How much further did you carry your estimates of elevation?

A. Just taking the slope of the mountain there?

Q. No, in this plat.

A. Yes, sir.

Q. Another half mile?

A. Something like that.

Q. Then, at a point a mile east of the initial corner this rise shown upon the plat here commences, does it not?

A. Yes, sir; that is a vertical angle there, 20 degrees and 22 minutes.

Q. That is the first abrupt rise you come to going east from the initial corner?

A. Yes, sir.

Q. A mile and a little over distant from the initial corner?

A. Yes, sir.

Q. West of the initial corner you stated that the grade for the first one thousand feet was eight feet to the hundred?

A. Yes, sir; eight feet.

Q. And for the next one $8\frac{2}{10}$?

A. No, 8 feet; the third was $8\frac{2}{10}$.

Q. And for the entire mile from the initial corner west, the first mile west, what is the grade and the fall?

A. 408 feet.

151 By Mr. VAILE:

—. How much east?

A. 678 feet.

Q. Now with reference to this diagonal line, I understood you to say that this diagonal line was taken upon the steepest profile crossing the initial corner?

A. Yes, sir.

Q. Over what area of country did you pursue your investigations in order to find where the steepest profile was?

A. Just turned the instrument towards the steepest slope that presented itself.

Q. At the nearest point?

A. At the nearest point.

Q. How far is it from the initial corner?

A. That is on the top of the mountain that point is, we simply took a vertical angle from this point.

Q. And this profile of the diagonal line marked upon this map is not intended to be drawn to the horizontal scale?

A. Yes, it is drawn to the true scale.

Q. It shows the profile correctly, as I understand you?

A. Yes, sir.

Q. It also shows the elevation as you proceeded upon that line?

A. We simply took the vertical line at the top of the mountain, at this point shows the slope of the mountain.

Q. This profile of the diagonal line shown in this plat correctly shows the contour of the ground upon the surface, and is the steepest line you could find passing through the initial corner?

A. Yes, sir.

Q. Now what is the elevation upon the diagonal line for the first thousand feet northeast from the initial corner? The first thousand feet, counsel asked you with respect to the first four hundred feet?

A. Ninety-five feet rise in a thousand feet.

Q. Going up the steepest thousand feet you could find with your instrument?

A. Yes, sir.

Q. What is the fall for the first thousand feet upon the diagonal line west from the initial corner?

A. Upon the southwest it would be,—it would be $71\frac{3}{10}$ feet.

Q. How far do you go northeast upon the diagonal line, the steepest line, before you come to this abrupt rise that you speak of?

152 A. 1,659 feet.

Q. Did you not speak of a rise which was 80 feet or thereabouts from the initial corner? You spoke of an abrupt rise of 40 feet.

A. I should state east upon the diagonal line.

Mr. VAILE: That is on the Baca grant line west of the initial corner.

Q. Is there or not any abrupt rise upon the diagonal line within the first three or four hundred feet from the initial corner?

A. No, sir.

Q. The first abrupt rise you come to going up the steepest line of ascent in 1,659 feet from the initial corner?

A. Yes, sir.

Q. And what is that rise; how much does that depart from the general contour?

A. $204\frac{5}{10}$ feet.

Q. Is there within 80 feet of the I. C. corner any abrupt rise to which your attention was directed which you discovered?

A. Yes, just east of it.

Q. How far east?

A. Within the eighty feet of that slope there.

Q. Upon what line?

A. It was on the north boundary line of the Baca grant.

Q. On this line (indicating on the map)?

A. Yes, sir. It shows plainer on the model.

Q. The natural scale is not large enough to show it?

A. No sir.

Q. Then of the 678 feet of rise in the first mile you get 40 feet of it within 80 or 100 feet of the I. C. corner?

A. No sir; that rise is on the other side of the I. C.

Q. The 80-feet rise. You said awhile ago in answer to my ques-

tion that in the first mile there was a rise here of 678 feet; that is, you say within 80 feet going east from this line there is an abrupt rise?

A. No, sir, on the west side of the I. C. corner.

Q. Then it is not in the first mile?

A. No, sir.

Q. Mr. Duval, did you observe the character of the timber and vegetation surrounding this I. C. corner?

A. Yes, sir.

Q What is it? Describe it briefly to the court and jury. For a thousand feet west of the I. C. corner what is the character of the soil and surface, and the timber and vegetation?

A. The soil is sandy, rocky in some places, and the timber is pinons and cedar.

153 Q. What is the character of it to the north of the I. C. corner for a thousand feet along where this diagonal line is run, and generally to the north of it, for a thousand feet radius?

A. It is sandy and more rocky than the boundary line is, and the timber is the same, pinons and cedar.

Q. And to the south what is the character of the surface and of its vegetation?

A. For the first thousand feet?

Q. For the first thousand feet.

A. About the same.

Q. And to the east?

A. To the east more sandy and not so much rock, and pinon and cedar.

Q. Substantially, then, there is no change in any direction for a thousand feet from the I. C. corner?

A. No, sir.

Q. How is it as to the second thousand feet of the I. C. corner?

A. It rises up more abruptly.

Q. And rises up more abruptly when you go a thousand feet west?

A. Yes, sir.

Q. After you pass the point you speak of as being a more abrupt rise, this 1,659-feet point, is there any change there in the vegetation and timber?

A. It is a steep slope of the mountain there.

Q. Just before reaching that 1,659 — point, or at that point, do you reach a small creek?

A. No, sir; not on the diagonal line.

Q. On the Baca line 1,659 feet northeast from the initial corner is there any change in the surface?

A. It slopes up very abruptly on the side of the mountain at 1,659 feet.

Q. In the second thousand feet from the initial corner going into the mountains, is there any change in the vegetation, or in the timber, or in the character of the soil, and if so, what?

A. The rocks show up more prominent than they do in the first thousand feet.

Redirect examination.

By Mr. VAILE:

Q. Mr. Duval, is it not an abrupt change from nine and a fraction feet per hundred to 24 feet in a hundred?

Objected to because that is a mere matter of figures.

Mr. VAILE: It is preliminary to another question.

154 The COURT: I do not think it is competent.

Q. How far northeast on the diagonal line from the initial corner is the place where it commences to rise 24 feet per hundred? Won't you just figure it up to see?

A. On a diagonal line northeast of the initial corner where it commences to rise at the rate of 24 feet in a hundred—a thousand feet.

Q. Well, then, if the change from between nine and ten to twenty-four feet in a hundred is abrupt, the abrupt change commences much earlier than 1,500 feet from the initial corner, does it not?

A. Yes, sir.

Q. When you speak of abrupt change, you mean the foot of that mountain where the vertical angle has been taken, do you not?

A. Yes, sir.

Q. And that is about 1,500 feet away, is it not?

A. Yes, sir.

Q. From the point where you take the vertical elevation it is a very straight smooth line running up the mountain, as shown on the model?

A. Yes, sir.

Q. Did the surveyors walk over that mountain at all?

A. No, sir.

Q. When you say it represents the contour, do you mean it represents from this point all the various undulations in the mountain?

A. No, sir.

Q. What do you mean, from the point where you say the vertical angle is taken, and from the point where the diagonal line is drawn in a straight line upward?

A. It shows the slope of the mountain.

Q. The angle from here to the top of the mountain, would it show any of the deviations in the surface from the point of observation to the top of the mountain?

A. Yes, sir.

Q. Are any of these profiles intended, from the point where the vertical angle is taken and the straight line drawn upwards, to show the deviations in the surface?

A. No, sir.

Q. But to show the average course from the point of observation to the top of the mountain?

A. Yes, sir.

Q. Mr. Duval, did you observe the steep peak, mountain peak, which is designated as "Crestone peak," just east of the line of the Baca grant, southeast of the northeast corner?

155 A. Yes, sir.

Q. I will ask you, for the purpose of mathematical computation for use hereafter, to state whether you have solved or can solve this problem: Assuming that Crestone peak is 107½ chains south, in a direct north and south line from the north line of Baca grant extended eastwardly, and that the angle made by a line drawn to Crestone peak from initial corner, the angle made by such line with the north boundary of the grant, is 16 degrees, 51 minutes; on the assumption that the longitude of Crestone peak is 105 degrees 34 minutes and 54 seconds west of Greenwich, can you from that data tell the longitude of the initial corner?

A. Yes, sir.

Q. What would it be upon that data?

A. 105 degrees 40 minutes and 6 seconds.

Q. These profiles are drawn upon a scale in which the vertical scale is greater than the horizontal. I will ask you to state whether in engineering and drafting for profiles extending over considerable country, as in the case of railroad surveys, and things of that sort, it is usual to magnify the scale in that way?

A. It is.

Q. It is for the purpose of bringing into relief the undulations of the surface, is it not?

A. Yes, sir.

Q. And is the recognized method of illustrating topography on the line of profile?

A. Yes, sir.

Recross-examination.

By Mr. SMITH:

Q. Mr. Duval, this Exhibit 38, looking at the exhibit as a whole, Mr. Duval, I will ask you to state whether it at any point or any line thereon shows the actual contour of the surface? None of this is drawn to the natural scale, is it?

A. It shows the surface on that scale.

Q. I say, do any of these lines show it according to the natural scale, the same as the way I showed to the jury a moment ago?

A. No, sir.

Q. None of these do?

A. No, sir.

156 THOMAS L. DARBY, a witness produced on behalf of the plaintiff, after being duly sworn, upon oath testified as follows:

Direct examination.

By Mr. VAILE:

Q. Mr. Darby, state your name to the court and jury.

A. Thomas L. Darby.

Q. Where do you live, Mr. Darby?

A. Cripple Creek, Colorado.

Q. What is your business?
A. Civil and mining engineer.
Q. How long have you been a civil and mining engineer?
A. About 24 years.
Q. How long have you practiced your profession in this State?
A Since the summer of 1874.
Q. About twenty years?
A. Twenty-one years, yes, sir, I have been longer than that in the profession, but that length of time in Colorado.
Q. Are you the person who made the completion survey of Baca Grant No. 4, and established and located the northeast corner up in the mountains?
A. Yes, sir.
Q. Did you study the topography of that country pretty thoroughly in the progress of making that survey of the east and north boundaries?
A. Yes, sir.
Q. I will ask you if you have since that time had occasion to examine the locality and its topography?
A. Yes, sir, I was there on the 9th, 10th, and 11th of this month.
Q. You may state to what extent you have personally been over and traversed the mountains in the northeast corner of Baca Grant No. 4.
A. I have been over the north boundary east to the corner and up within a mile and a half of the corner on the east line.
Q. Then have you examined the base of the range?
A. Yes, sir.
Q. I will ask you to state whether or not you have placed upon any map of Baca grant the topography of the mountainous portions as you have found it to be by your observations?
A. Yes, sir.
Q. (Producing a map.) What is this map that I exhibit to you?
157 A. That is a map of the grant, but I did not make this part of the map (indicating), I put the topography on the east part.
Q. The topography, then, on this map is your handiwork?
A. Yes, sir.
Q. I will ask you to state whether it correctly represents, according to your observations, the topography of the mountains in relation to the valley in which the grant lies.

Objected to by counsel for defendant, for the reason that no map can correctly show the topography; that it is impossible to show the topography in relation to a point as indefinite as the initial corner, and that the topography generally for the purpose of this issue to which this testimony is being directed, could not possibly be shown by the map; that the witness is here and has been on the ground and that counsel should ask him what the topography is, as a matter of fact, not what he has attempted to reproduce upon a scale which must be so infinitesimally small as this must be.

The COURT: I think you had better not use the map, but ask him the question.

Mr. VAILE: We desire to ask him whether he has placed upon this map the topography as he found it upon the ground, and then to introduce the map, so that we may have an illustration of what this witness means; we cannot explain by words as well as we can by a map the relation of things.

The COURT: The word "topography" has a very close and definite meaning. If you will avoid the use of the word topography and ask a question which comprehends the general subject of the mountainous region perhaps we can allow it.

Q. Mr. Darby, I will ask you whether, after having traversed these mountains, you made a survey of the north boundary and the east boundary of the grant in the northeast corner and made your observations at the base of the mountains of which you have spoken, and whether you marked upon this map here before you the mountains in their relations to the ground as shown by your observations?

A. I have.

Q. Do they correctly express your own observations with regard to the relation of the mountains to the plain?

A. Yes, sir.

Whereupon counsel for plaintiff offered said map in evidence; to which offer counsel for defendant objected, and objected to
158 the introduction of that map and its insertion into the record, for the reason that its only identification and the only statement in the witness's testimony in relation to it is the one which has just been made, and that the defendant should not be bound by the statement, and it should not go to the jury, it being an attempt to mark upon a map so plain a feature upon the surface of the ground as a chain of mountains and their relation to the plain upon such a small scale as to be impracticable and impossible.

The COURT: You are at liberty to ask the question whether it presents the country well, but it is not for the court to say that it does not present it at all.

The witness uses a map as illustrating his testimony; its value is a question to be considered at all times.

Whereupon said map was received in evidence, and marked Exhibit No. 39, and the same is covered by the order of certification hereinafter set out.

Counsel for defendant then and there reserved an exception to the ruling of the court, admitting the introduction of said map in evidence.

Q. Mr. Darby, did you recently act with Mr. Duval in making a further survey of the country in the vicinity of the initial corner, the relative levels and character of the country, and the relation of the mountains to the valley?

A. Yes, sir.

Q. Have you examined the profiles which have here been offered in evidence in connection with Mr. Duval's testimony?

A. Yes, sir.

Q. I call your attention to Exhibit 37, and I will ask you to state to the jury, as a civil engineer, what the custom is in reference to delineating profiles upon scales horizontal and vertical. I wish you would illustrate, if you please, quite fully, the methods of expressing such relations with vertical and horizontal distances.

A. It is always usual in engineering to exaggerate the vertical scale in a profile, for the reason that the height of anything as compared to the surface of the earth is so slight that you cannot appreciate irregularities drawn on the true scale. If you could conceive a man standing whose height was at *at* the same scale as this map, he could appreciate what the natural slope was looking at it merely as a projection, but we cannot appreciate it on the map, no eye can, it is a thing that is so very deceptive, and consequently you have to exaggerate in order to form any conception of the irregularities of the earth's surface. Usually in railroad work the exaggera-
159 tion is ten to one, make the vertical scale ten times as much as the horizontal. That is done for the purpose of fixing grades. You could never use your rules for cuts and grades on railroad work except you exaggerated the vertical scale.

Q. A railroad grade would be shown on a scale of ten to one?

A. Yes.

Q. Much greater than these?

A. Yes, sir, very much so. You could not make a profile of that country on a ten to one exaggeration at all.

Q. On this map marked Exhibit 37, both the natural scale and the exaggerated scale are shown so as to illustrate the difference between the two?

A. Yes, sir.

Q. You may state whether these profiles on the scale that you have made, correctly represent the various lines over which these surveys were extended when you and Mr. Duval were on the ground recently?

A. Yes, sir.

Q. Have you, Mr. Darby, examined the model which has been produced in court here, to represent the contour of the country in controversy?

A. Yes, sir.

Q. Have you checked this model off recently and carefully, for the purpose of seeing whether upon the scale it purports to bear, it correctly represents the relative position of points and the relative altitudes?

A. Yes, sir, I have.

Q. You may state whether or not it does, in so considering its scale, correctly represent that which it purports to represent?

A. Yes, sir, it does.

Q. If a line were drawn from the point of sudden and abrupt change at Willow creek, one mile north of the north line of the Baca grant to the place of sudden and abrupt rise at the Crestone

creek one mile north of the north line of the Baca grant, would or not that line represent the average course of the base of the range between the points mentioned?

A. Yes, sir, it would.

Q. I will ask you to state where the initial corner of Baca grant is in reference to the line of the range which you have just mentioned?

A. It is on that line practically.

Q. I will ask you whether the Baca grant itself, the north boundary of the Baca grant ascends the mountain range in its steepest course, or diagonally?

A. Diagonally.

Q. What is the direction from the initial corner to the nearest mountain?

160 A. The nearest high mountain? North 40° east.

Q. You may state whether the base of that mountain extends to the vicinity of the initial corner?

A. It does.

Q. State whether or not it flattens after passing the initial corner going southwest?

A. Yes, sir.

Q. What line upon this model, which is Exhibit 36, would represent, if any of them would, that mountain which comes down thus?

A. That line (indicating).

Q. Marked "B B"?

A. Yes, sir, marked "B B."

Q. You may state whether or not this ridge is plainly apparent in viewing the mountains from a little distance away, say a half a mile away?

A. Yes, sir.

Q. Can you describe the general appearance of the mountains as they come down in this direction, as seen from a half a mile away, or a mile away?

A. Yes, sir, right in that particular line there is a succession of little slopes or ridges down the mountain range. That is the most prominent one of any of them coming right down to where the initial corner is, the top of the range is to the northeast, and they have a succession just like your fingers of little depressions between.

Q. Not very little, are they: you mean little with reference to the mountain range?

A. With reference to the mountain range, as you look at them from a distance; the most prominent of these is that line that we took the course on there.

Q. From your observation of this country in reference to the trend of the range itself, the trend of the various points in relation to each other, and of the steepest ascent from the general country below, what would you say as to whether the initial corner is located at the base of the range?

A. I should say it was located there at the general trend of the base of that range, as near as any one could get at it.

Q. From your knowledge of the country, which is acquired both from your old survey of the north boundary and your study of the country at that time, and from your study of the country on this recent trip, you may state whether or not it would be practicable, in your opinion, and whether you could as a surveyor go upon the ground and definitely locate the initial corner of the Baca grant, if you had no call except the following: "Commencing at the eastern edge of the San Luis valley, where the 38th parallel of latitude crosses the base of the snowy range dividing the waters
161 of the Arkansas and the Del Norte rivers," assuming for the purpose of the question that the north boundary of the Baca Grant No. 4 is the 38th parallel of latitude, could you as an engineer, with no other call than that, find the initial corner?

A. Yes, sir.

Q. You may state, if you were to locate the initial corner upon such a call, where you would locate it in reference to the point where Mr. Sheldon located it.

A. I think I should locate it just about there, maybe a foot or two one way or the other, but right in that immediate locality.

Q. Have you the notes which show the grade on this diagonal line?

A. Yes, sir; a part of it.

Q. What is the grade, that is, the rise per hundred feet is the way I would like to have you express it, for the first four hundred feet northeast of the initial corner on the line B B?

A. Ten feet in a hundred.

Q. Have you the data to show what the fall per hundred feet is immediately southwest of the initial corner on the same line?

A. No, I have not. Mr. Duval has that.

Q. It is not in your notes?

A. No, sir.

Q. I wish you would give the rise per hundred feet from this point (indicating) northeasterly along this line, up to the point where you took a vertical angle.

A. Well, the next 502 feet is 9 feet; then for 96 feet, $9\frac{1}{10}$ feet; then for 366 feet it is $24\frac{1}{10}$ feet per hundred; then for $83\frac{3}{10}$ feet, or 84 if you choose to call it, it is 17 feet and then for 202 feet on top of the little ridge it is $3\frac{3}{10}$ feet.

Q. There it follows flat for a little ways?

A. Yes, sir; for a very little ways.

Q. Then the mountain goes up at $44\frac{4}{10}$ feet per hundred?

A. Yes, sir.

Q. Taking these general slopes, from the point where you speak of taking an angle, do you follow the various undulations of the surface?

A. No, sir; we took the angle from that point to the top of the mountain.

Q. But at a place where it rose?

A. Yes. At the foot where it rose.

Q. And then drew for your contour the straight line as shown by that angle?

A. Yes.

162 Q. From this point, where you took this vertical angle, from there to the top of the mountain what would be the rise per hundred feet?

A. $44\frac{4}{10}$ feet per hundred feet.

Q. Besides the matter of grades, that is, of rise of the country, and the average trend of the foot of the mountains, I will ask you to state whether there is in this locality anything in the nature of the soil or surface of the ground which distinguishes the mountain country from the plain country.

A. Yes, sir; rocks principally.

Q. Take it on the north boundary line of the grant, what is the nature of the country east of the initial corner for the first half mile, as compared with that west of it?

A. Well, the country east of the corner is all rock. Of course all of that country has more or less sand in it, but east of that corner it is all rock, and it is broken up more or less by dry ravines, or washed out at places, little things of no importance, but still they cut into the land. It is rocky all the way up there, and the creek comes along and crosses and recrosses the line in several places, breaking up the country; and from there on it is a mountain going on towards the east.

Q. You rise in a sort of a basin in the mountain, to some extent?

A. This line runs up along the valley of the South Crestone creek before you are at the general trend of the base of the range at the initial corner; after that the country does not immediately rise right up from there because this Crestone creek comes in down close to the line.

Q. That is the South Crestone creek?

A. Yes, sir; comes down close to the line all the way for half a mile or more, and while you are in the mountains, it does not show an abrupt rise.

Q. Immediately off the line within a few hundred feet from the corner, you get right into the general trend of the mountains?

A. Yes.

Q. That is to say, by departing from this straight east-and-west line at the initial corner, you get into the mountains very quickly?

A. Yes, sir; at once.

Q. That would be on the course of the diagonal line B B on the model?

A. Yes, sir.

Q. Is this Crestone creek which you say follows down along on the line the same as is in the Sheldon survey known as the Trois Teton?

163 A. Yes, sir.

Q. Did you mark upon the base of this model, which has been marked as Exhibit 36, the positions of the creeks?

A. Yes, sir.

Q. Are they correctly represented on there, and as found by your surveys crossing the lines in the model?

A. We did not run them out.

Q. But the course of the profile lines there are correct?

A. Yes, sir.

Q. At Willow creek I will ask you to state what the course of the mountains is right there?

A. Right at the creek the mountains begin to rise very abruptly and very steeply.

Q. Is the creek itself in a cañon?

A. Yes, it is down possibly fifty or sixty feet deep where it breaks down into the general trend of the mesa along there.

Q. You have spoken of the rocky character of the country east of the initial corner. How is it as compared with that part of the country west of the initial corner (alone) the line of the Baca grant?

A. The country west, when you get away from the creek there, is a good, smooth country, and slopes to the west, the slope to the west is a good smooth country; the only place where it shows rocks is along the present bed and the old bed of the creek, where the creek washed it out and left the rocks exposed along the bottom; away from the creek it is a good smooth piece.

Q. Between the locality of the initial corner and the point marked "Station 51" upon this plat, is there any village situated, or hamlet?

A. Yes, sir.

Q. What is it called?

A. Crestone.

Q. The town of Crestone is marked on this other map?

A. Yes, sir, right in there (indicating).

Q. What sort of country is it that lies over in the vicinity of Crestone?

A. Pretty sandy country; farms there, and gardens.

Q. Descending to the southwest?

A. Yes, sir.

Q. That is on the east side of Crestone creek?

A. Yes, sir.

Q. Mr. Darby, when you made your survey of this country two years ago, or three years ago——

A. Two years and a half ago.

164 Q. (Continued)—did you have occasion by your triangulations or measurements to ascertain the distance of a certain point or peak, which is known as "Crestone peak," from the north boundary of the Baca grant extended?

A. Do you refer to what Hayden calls "Crestone peak?"

Q. Yes; how far, measured in a north and south line, is that point called "Crestone peak" by Hayden, south of the north line of Baca grant extended easterly?

A. 107½ chains.

Q. Is that peak visible from the initial corner?

A. Yes, sir.

Q. Did you take the angle which a line to that peak would make with the north line of the Baca grant?

A. Yes, sir.

Q. What was that angle?

A. 15 degrees, 51½ minutes.

Counsel for defendant thereupon asked to be permitted to reserve the right to have this testimony stricken out.

Q. Mr. Darby, with that data, and on the assumption that the longitude of Crestone peak is 105 degrees, 34 minutes and 54 seconds west of Greenwich, can you tell what the longitude of that initial corner would be?

A. Yes, sir, 105 degrees, 40 minutes and 6 seconds.

Q. I will ask you to state whether upon one of these profiles the crossing of the creek east of the initial corner is shown?

A. That is, the direction of the crossing?

Q. Yes; the stream is flowing right along the grant line for a little distance?

A. Yes, sir.

Q. And this (indicating) is where this profile line would come out?

A. Yes, sir.

Q. I will ask you to state whether it is the stream which upon this model Exhibit No. 36 is shown upon the grant line east of the initial corner and upon the line A A.

A. Yes, sir.

Cross-examination.

By Mr. SMITH:

Q. Mr. Darby, what is the controlling feature which would lead you to select the particular point where this initial corner is, as being the base of the snowy range?

A. The evidence of it on the surface of the earth, evident to the eye. You can see it.

165 Q. What is there different there from any point within—say a thousand feet east or west of that line, along that parallel?

A. It is the general difference in the slope of the country, sir.

Q. Have you made any map or profile which shows any difference?

A. The map shows it.

Q. Will you please point it out?

A. It shows right on the model here. If you go there on one of these little ledges here you can see it down there for fifteen or twenty miles, you can see the general trend of the base of the mountains.

Q. How far down the mountain do you go before you come to the base of it?

A. Where the slope changes.

Q. Now, does the slope change right after you get to that point?

A. Yes, sir.

Q. Let me ask you now, if that is the general feature which led you to select that as the point for the initial corner?

A. Yes, the slope of the range there.

Q. Is there any other reason than your mere general view which you took of the entire range, for selecting some particular line along the edge of the mountain which you say is the base?

A. I took the difference in the levels.

Q. What is the difference in the level at this point?

A. There is a difference right there on that diagonal line of perhaps two feet and a half in a hundred, right there. In determining a line of this kind you can't take the base of the range for what would be the extent of the country for a hundred feet square, or two hundred feet square, but the general trend of the base.

Q. Take it for a thousand feet square; take it for a thousand feet in all directions from this point which you say is the natural, the only place for the initial corner of that grant; what change is there, what distinct physical feature on the surface of the ground is there which tells you that that is the point for the initial corner?

A. The slope of the ground.

Q. Is that all?

A. The rocks and the slope, and the solid rocks of the mountain decomposed and broken off.

Q. Is that all?

A. I don't see as you want any more.

Q. Is that all? It makes no difference what I want.

A. Yes, that is all.

166 Q. Is it the slope of the ground, substantially, and the character of the soil and the fact that there are rocks here?

A. Sometimes it is the character of the soil, and sometimes it is not the character of the soil; it is the solid rock of the mountain.

Q. It is the slope and the solid rock in the mountain. Is there anything else?

A. No.

Q. I am speaking of a piece of territory of a thousand feet in every direction from this initial corner. What is there in that square of a thousand feet square which leads you to say that that initial corner is exactly the base of the range?

A. A thousand or two thousand feet would not be anything to determine by, it is the general trend of the base of that mountain in ten or twelve miles is what led me to take that point.

Q. Then you disregard the main surroundings of the initial corner?

A. It would not be disregarded, because here is a line which incidentally runs up the valley of the creek, you can run up there for a half a mile, before you come to an abrupt slope, and I maintain you have got to determine it by the general trend of the slope of the mountain.

Q. And following along the 38th parallel going east, if I understand you now correctly, you strictly follow along this small creek, and following that up there is no material change in the grade or elevation?

A. I think there is in the elevation.
Q. Where is the material change?
A. It begins within a few feet of the corner and gets steeper and steeper as you go up.
Q. You made this map partly?
A. I did the lettering on it.
Q. Is it correct?
A. I scaled it and checked it.
Q. And made all this correct?
A. Yes.
Q. And this lower line here marked "Natural scale 1 inch to 400 feet;" does that or does it not, correctly show the general grade of the country there east and west along the 38th parallel from the initial corner?
A. Yes, sir.
Q. Well, now, following along that parallel, that is what the survey calls for?
A. Yes, sir.
Q. Go east upon the parallel until you get to the base of the range?
A. Yes, sir.
167 Q. Following along from this initial corner here, there is an abrupt rise in front of you, is there?
A. Not absolutely abrupt.
Q. Is there any material rise, is there any change?
A. A rise of a few feet in a hundred.
Q. Is there any more than the ground over which you have traveled for two miles back?
A. Yes, sir.
Q. Then is Mr. Duval wrong in his statement of this?

Objected to by counsel for plaintiff.

A. There is 672 feet rise from the mile east, and 400 in the mile west. Is that not a very decided change?
Q. Do you know where in this rise that 672 feet rise came?
A. It is rising all the way.
Q. Where does it rise most?
A. It rises most towards the last half of it, the rise increases as you go up, go east.
Q. Do you remember, or do you know what the rise was in the first thousand feet east of the initial corner?
A. I have not got the levels, Mr. Duval had those, a pencil memorandum of it made.
Q. The memorandum he made of it was correct according to your mutual survey?
A. Yes, sir.
Q. He said it was 10 feet. That is correct is it not?
A. That is correct if he said that.
Q. And if he said it was $8\frac{2}{10}$ feet before you got to the initial corner; that was also correct?
A. Yes, sir.

Q. Then of course it follows that there was no material change in the rise going east on that parallel? Didn't he say it was $11\frac{2}{10}$ for the first thousand feet?

A. No, sir, he said it was $8\frac{3}{10}$.

Q. So that, aside from the change in the elevation, and the fact that there are decomposed solid rocks in the mountains there, you are not prepared at the present to indicate any further feature which would lead you to select that as the true point of the initial corner?

A. And the general trend of the base of the range.

Q. Going up the ridge, I see where there is the grade there, looking down for fifteen or twenty miles. Would you say it was the general contour of the base of the range?

A. You understand I was travelling up and down the base of that range there seven or eight times, and have been down through this town of Sangre de Christo, and along there, and know the country pretty thoroughly.

168 Q. You have been more or less in the employ of the gentlemen owning the grant, have you not?

A. No, sir.

Q. You made the survey for them made to complete their survey two years ago, did you not?

A. I made the Government survey.

Q. And when you went down this time on the 9th, 10th and 11th of the month, you went there at their request?

A. Yes, sir.

Q. And this initial corner was pointed out to you?

A. I knew right where it was; I found it.

Q. Did you go up on this high ridge and look down along the foothills?

A. Yes, sir.

Q. And you made up your mind that about there is where the general average base of the mountain would strike?

A. Yes, sir.

Q. Now, in locating and determining the general range of the mountains, what is it that determines to your mind where the base of the mountains is?

A. The change in the slope.

Q. Then in looking for this point you would look for a corresponding change in the slope of the base of the mountain?

A. I would determine that line by that general change of slope.

Q. In your direct testimony you said that going into the mountains on the 38th parallel you would have to depart from the parallel really to get into the mountains. Did you mean that?

A. When did I say that?

Q. That is as I understood; if you didn't say that I am mistaken; it is true.

A. When I run the line after I got east of the second mile, two miles east from the initial corner, then you have to depart; no man could go over it there.

Q. In response to Mr. Vaile's question I understood you to say that when you reached the initial corner in order to get into the

mountains,—not at the time you made your first survey, but now, to get into the mountains proper would you have to depart from the mountains proper to get into that parallel; that the mere fact that the parallel carried up the general line of the creek caused a change at that point?

A. You have got it all mixed.

Q. Is that true or not?

A. I did not see anything of the kind.

Q. I am asking you whether it is true, the fact that the parallel goes into the mountain if followed up the bed of the creek?

169 A. Not the bed of the creek; the valley of the creek.

Q. Following up the bed of the creek when you come to the initial corner in order to find the base of the mountain would not you have to go to one side or the other?

A. The mountain slopes there to the southwest, and as you go on to the east it slopes to the south coming down to this creek, and the base of the mountain is almost practically right at the initial corner coming from the northeast.

Q. The accident of the existence of this valley opening up and coming out of the mountain at the same point where the parallel enters, it would require you to make a kind of an abrupt angle and go further east into the mountain, would it not?

A. It is steep on the mountain slope.

Q. It would require you to go two miles further east?

A. No, sir, less than a mile.

Q. How much timber is there about this I. C. corner for, say a thousand feet each way; is there any change in the timber for a thousand feet east and west?

A. I didn't take any particular note of it, there is going into the mountain.

Q. Is there any change in the nature of the mountain as to being rocky, or otherwise?

A. Yes, sir.

Q. How much of a change would there be?

A. As you go west, when you get away from the old creek beds there the country is all covered with soil and grass; as you go east and northeast you come right into the rocks there.

Q. Are there more or less trees and more or less vegetation as you go east and west from the initial corner?

A. As you go east there is some trees and vegetation,—I suppose you mean by that grass—there is more grass as you go west.

Q. About the initial corner, for a few hundred feet in each direction from the initial corner is the ground particularly rocky?

A. Well, to the northeast, yes.

Q. After you come to the rise?

A. Right at the initial corner there is not much rock, but for about two hundred feet to the northeast there is, but going east about two hundred feet you come into the rock, probably one of the old creek beds.

Q. How far is the creek from the initial corner?

A. The creek I would judge was probably 400 feet south of the initial corner.

Q. And running in what direction?

A. Running in a direction a little south of west.

170 Q. How far is it northeast on the diagonal line before you come to a sudden, abrupt rise, if you remember?

A. About a thousand feet, a precipitous mountain goes up.

Q. That is the rise which you designate as being $24\frac{1}{10}$ feet in one hundred?

A. I think so; that is right.

Q. And for the first thousand feet going northeast the rise is what?

A. As to the first 408 feet, 10 feet, and as to 502 feet 9 feet in a hundred. That is accounted for, the 502 feet in this way,—the last one hundred feet of that is nearer flat, sort of a sandy nature.

Q. Otherwise it would be about the same as the first one?

A. Yes, sir, otherwise the general slope is about the same, being about 10 feet in a hundred; the last 100 feet is a little sandy flat place.

Q. And that I understand to be the steepest grade you could find in the neighborhood of the I. C. corner?

A. No; that merely went onto a little local ridge, and we went up that on a slope of 24 to a hundred.

Q. I am speaking of the first thousand feet of the diagonal line you made, where you searched for the steepest grade; you gave one steeper than that; we want it at this main general ridge coming down in the mountain, you gave one a little more to the north which would have been steeper than ten feet for the first thousand feet, and we want it at that main ridge coming down there.

A. I took it that way; it is steeper; as you go a little more to the northeast it would be still steeper.

Q. At what visit was it that you located the longitude of the initial corner?

A. Well, I located this upon my original survey; located all those peaks for the purpose of making the report.

Q. Did you ascertain whether or not the I. C. corner was upon the 38th parallel?

A. I never made any observations of my own; it was established by the Government.

Q. Did you make all of this map?

A. I only put on the topography.

Q. You only put on the mountainous corner?

A. It was an old map and I erased the topography they had there and put it on from my own notes.

Q. The letters there, the N., what is that intended to represent?

A. That is 1 M., one mile.

Q. And that other, 2 mile, comes right there at the base of the mountain?

171 A. Yes, sir.

Q. And that is the initial corner here?

A. That is the initial corner.

Q. Does this correctly represent the streams flowing on this grant?

A. Yes, sir; that is, as near as you can from that scale.

Q. This is the stream that you spoke of?

A. That is the Trois Tetons.

Q. Did you run out these streams so that you know these are correct; did you establish the base line all along here and take up each of these points, up the stream?

A. They are all marked there, Cotton Wood, Spanish, South branch, Willow creek; all marked upon that, that is all.

Mr. VAILE: I will just offer one more matter, to which I do not suppose counsel will object, and that is a statement from the Geological Survey, of the longitude of Crestone peak, given upon page 285 of the United States Geological and Geographical Survey of the Territory of Colorado and parts of adjacent Territories as follows: (Reads:)

"Names of points".....	"Longitudes".....
* * * * * *	* * * * * *
"Crestone Peak"	"105° 34′ 54″"

Thereupon, counsel for plaintiff offered in evidence a certified map from the Hayden geological and topographical survey, certified by the director of the Geological Survey and by the Secretary of the Interior, made in 1873, showing the contour lines at every 200 feet vertical; the purpose of the testimony already introduced being to enable plaintiff to show where upon this map Baca Grant No. 4 would be, which can only be done by determining the longitude; this offer being for the purpose of locating Baca Grant No. 4, and of fixing the longitude of the initial corner upon this map, and to locate the grant upon this map.

Whereupon said map was received in evidence and marked as Exhibit No. 40, and is included in the order of certification hereinafter set out.

Counsel for plaintiff then offered in evidence the model which has been heretofore marked as Exhibit No. 36, which exhibit was received in evidence, and is included in the order of certification hereinafter set out.

172 It was thereupon stipulated that the Baca grant has been marked continuously up to this date upon the official maps issued by the Land Department of the United States; subject, however, to the same objections, that that fact does not enlarge their grant.

Whereupon counsel for plaintiff offered in evidence the latest map issued by the Land Department, showing the Luis Maria Baca Grant No. 4, which was received in evidence and marked as Exhibit No. 41, and is included in the order of certification hereinafter set out.

Thereupon the plaintiff rested his case.

And this was all the evidence introduced on the trial of said cause.

(WEDNESDAY, *May 22d*, 1895.)

Whereupon the defendant by counsel made the following motion, to wit:

The defendant desires to move at this time for an instruction from the court to the jury directing a verdict in favor of the defendant, upon the ground of the failure of sufficient proof to maintain the plaintiff's case, the grounds of the motion being:

First. That there was no sufficient or proper selection of the land granted by the act of Congress of June 21st, 1860, within the time limited by the act, three years from th-t date. That the so-called selection of Watts was void by reason of the uncertainty of the description, and that the designation of the initial corner as the base of the range was not a sufficient description to identify the land, and that no further acts of identification or of selection of any kind or nature were had or done within the three years' limit of the act of Congress.

Second. Because the act of Congress reserved all mineral land, and forbid the entry upon mineral land, and because there has never been at any time any form of conveyance, or any patent or deed, or any act of Government, or of its officials, which had the effect of conveying the estate which the Government reserved by the act, to wit: mineral land of any kind. Because it is conceded by the pleadings in this case, and is shown by the proof, that the land in controversy is claimed and held by this defendant, and by his grantees, as mineral land; and that it is mineral land.

Third. Because the proof of the plaintiff shows that no sufficient or proper survey of this land, or complete survey, was made upon the ground until the lapse of three years after the so-called
173 selection by Watts; that the Sheldon survey was incomplete, and remained incomplete, until the Darby survey in 1892.

Fourth. We make a special objection, and as a ground of this motion, that the approval of the plat made by Surveyor General Pearce on the 18th day of March, 1864, was expressly made subject to the provisions and conditions of the act of Congress, and because the evidence already introduced shows that a certificate of the surveyor general that this was vacant land and not mineral, made upon December 5th, 1863, was expressly and in terms rejected and disapproved by the Commissioner of the General Land Office in January, 1864, and no further or other certificate was ever made by the surveyor general upon that subject.

Fifth. Also, because the evidence in this case shows that the real claimant and locator of this ground, William Gilpin, located, or attempted to locate this grant, in violation of the terms of the act, and in violation of its provisions and limitations, and with knowledge that he was seeking to take mineral land; and because that is shown by the record upon which the plaintiff must rely, and with knowledge of which *they are* charged.

The COURT: I have reached the conclusion that the defendant's motion should be sustained; and I suppose I had better say what I have to say upon the subject in the way of a charge to the jury. It will put the matter in the best form for the record.

(And to the decision of the court in sustaining the motion of the defendant for a direction to the jury for a verdict in the defendant's favor, the plaintiff at the time objected and excepted.)

Thereupon the court instructed the jury as follows:

Instructions to the Jury.

HALLETT, *J.* (orally):

This action, gentlemen of the jury, is to recover a small plat of land in what is known as the Baca Grant No. 4 in the San Luis valley; I think it is in the county of Saguache, but I am not sure whether the county is given in the complaint.

The plaintiff relies upon an act of Congress passed June 21st, 1860, by which the heirs of Luis Baca were permitted to locate this tract of land. You have heard the testimony at great length as to the way in which the location was made and surveyed and all the proceedings in the land office in respect to it. Objection is
174 made that the location was not within the time limited by the act of Congress, which was three years, and that is put upon the ground that there was no sufficient description of the tract located to make it known to the public at large where the location would be, and upon the ground that the initial point from which the survey of the tract would be extended was not a fixed and determinate point. That was declared in the paper filed with the surveyor general of New Mexico to be the point where the 38th parallel of latitude crosses the base of the snowy range which divides the waters of the Arkansas and Del Norte rivers at the eastern edge of the San Luis valley. It is said that this is not sufficient to fix the location, and there should have been some monument or some natural object open to the view of all people from which the lines should be run. Upon that I do not care to enter at length; I shall assume that the testimony which has been delivered before you is sufficient to enable you to determine this point, and that you would determine it under the testimony to have been properly fixed. If the location was so designated as to be understood by the public at large, I am of the opinion that the circumstance that no survey of the location was made within the three years following the passage of the act is not material; a survey was in fact made in the latter part of the year 1863, and about six months after the expiration of the three years mentioned in the act. I assume also that the survey made by Mr. Sheldon was sufficient in form. The lines were not closed at the northeast corner; there were three or four miles of the north line, and perhaps a greater length of the east line, which were not laid at that time, because of the difficulty of traversing the mountains. The surveyor states in his notes that he found it impossible at the season of the year in which he was carrying on the work, to proceed over the mountains, and so the lines were not laid at the time. This survey having been accepted by the officers of the Land Department, and approved by them, it cannot be alleged that it was not in form sufficient; or that there was any defect in it from the circumstance

that a portion of the lines were omitted from the survey at the time when it was made.

Upon that we come to another question, which is the most important in the whole case, and that is, whether mineral lands passed by the terms of the act and what was done under it, to the grantees therein. The act itself declares that the location of the tract shall be upon lands vacant and not mineral. The grantees, the heirs of Baca, were not at liberty to select mineral land. The complaint describes the land of which the defendant is said to be in possession, and which he wrongfully withholds from the plaintiff, as mineral land; so that you have no question to consider
175 whether the lands were or were not of that character; the plaintiff having averred that they have the character of mineral lands, there is no issue upon that point. So, that the question presented and simply stated is whether mineral lands passed under the grant of the act of June 21st, 1860, and, as I have said, the grantees under that act, the heirs of Baca, were required to select lands which were not mineral. In any selection which they could make they could not determine the quality of the lands in that respect; that is to say, they could not determine in a manner which would be conclusive upon the Government and upon subsequent claimants under the Government, whether the lands were or were not mineral. In order to make a valid determination of that matter there must be some participation by the Government in the selection; that is to say, the Government must investigate and pass upon the question whether the lands selected were or were not mineral.

And so we come to the question whether anything was done by the Government in that direction at any time whatsoever, or up to the time of the approval of the survey of the lands. It is contended for the plaintiff that the act itself, and the selection of the lands under it, make a good title in the grantees named in the act, and it may be true that no other evidence of title was required. I have not looked into that question particularly whether there was authority in the Government to issue a patent for the land or not. It is said, and seems to be established by the various communications from the Land Department and the officers of that department, that they constantly maintain that there was no authority in the Government to issue a patent for the land, and, therefore, they have declined to issue it, upon all such occasions the officers of that department declared that the act of Congress and the survey with the plat of the land constituted the title of the grantees under the act. No further communication, and no other document or paper, could be issued by the Government in confirmation of the title of the grantees. However that may be, if it appeared that the officers of the Land Department in Washington had at any time passed upon the question of the conclusiveness of the grant, and had declared in terms that the land was not mineral, or to that effect, it might be said that the grantees took the land as not being mineral, and, whatever its character, that the question was properly decided by the Government, and binding upon all who might subsequently make claim to it.

It seems upon examination of the testimony which has been

offered to you that no such determination was made. The communication upon which the surveyor general of the Territory
176 of Colorado approved the plat and the notes of survey expressly required in making such approval that it should be declared that the lands within the tract were not regarded as mineral. The instruction of the Commissioner of the General Land Office, as found in a letter to the surveyor general of Colorado, of date February 12th, 1864, is that he will be authorized to approve the plat, upon finding it to be correct, in the usual way; and the Commissioner adds: "In your certificate of approval you will add the special reservation stipulated by the statute, 'but not to embrace mineral land, nor to interfere with any other vested rights, if such exist.'" That is to say, the surveyor general of Colorado was authorized to approve the plat in so far as it did not embrace mineral land; the Commissioner of the General Land Office apparently expressly declining to decide the question whether the land selected was or was not of that character.

Now, it is true that the surveyor general did not put these words in his approval. In the approval which he in fact made, he said that it was subject to the provisions of the act of June 21st, 1860, and taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the approval. So that I feel bound to say that the approval was with the condition that the plat should not embrace mineral lands as directed by the Commissioner, and if this be the correct construction of the papers and documents, and of the act of the surveyor general in making the approval, nothing thereafter done by the officers of the Land Department in the way of declaring what the force and effect of the approval might be, would at all change the character of the transaction, or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made.

There are several communications from the department to persons who were more or less interested in the tract, or who assume to have some interest in it, in which the Commissioner, or some one connected with the department, assume to say that the matter of the mineral character of the land was passed upon at the time of the approval of the survey. I cannot give to these communications any effect whatever. We must assume that the Commissioner had no authority to thus construe the decision of his predecessor in office or to give it any other effect than that which it appears to have from the letter of February 12th, 1864.

Upon all this, gentlemen, I feel compelled to state to you, upon the principal matter embraced in this case, that the act
177 of June 21st, 1860, and what was done under that act from time to time, did not vest in the grantees of Luis Maria Baca, and their successors in interest, the mineral lands which may be within the tract located. This, of course, has no effect whatever upon such part of the tract, which seems to be by far the greater part, as is not mineral. That which is pastoral and agricultural only, cannot be correctly described as mineral land, and it would

doubtless pass under the grant without any question whatever such as is presented to us here.

The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant, and which he claims as a mine, is embraced in the grant to the heirs of Luis Maria Baca, there is, of course, nothing left for you to do but to return a verdict upon the testimony for the defendant in the suit.

And thereupon the plaintiff by his counsel objected and excepted to certain portions of the instructions so given by the court as hereinafter specifically set forth.

The court instructed the jury, among other things, as follows:

"I think that if it appeared that the officers of the Land Department in Washington had at any time passed upon the question of the conclusiveness of the grant, and had declared in terms that the land was not mineral, or to that effect, it might be said that the grantees took the land as not being mineral, and whatever its character that the question was promptly decided by the Government and binding upon all who might subsequently make claim to it. *It seems upon examination of the testimony which has been offered to you that no such determination was made.*"

(To which last statement of the court so given in his instructions to the jury the plaintiff at the time objected and excepted.)

"The communication upon which the surveyor general of the Territory of Colorado approved the plat and the notes of survey expressly required in making such approval that it should be declared that the lands within the tract were not regarded as mineral."

(To which instruction of the court the plaintiff at the time objected and excepted.)

"The instruction of the Commissioner of the General Land Office, as found in a letter to the surveyor general of Colorado, of date February 12th, 1864, is that he will be authorized to approve the plat upon finding it to be correct in the usual way. And
178 the Commissioner adds: 'In your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land, nor to interfere with any other vested rights, if such exist.' That is to say, the surveyor general of Colorado was authorized to approve the plat in so far as it did not embrace mineral land."

(To which last statement of the court so given in his instructions to the jury the plaintiff at the time objected and excepted.)

"The Commissioner of the General Land Office apparently expressly declining to decide the question whether the land selected was or was not of that character."

(To which last instruction so given the plaintiff at the time objected and excepted.)

"Now, it is true that the surveyor general did not put these words in his approval. In the approval which he in fact made, he said that it was subject to the provisions of the act of June 21st, 1860; and taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he

had put the exact words given to him by the Commissioner into the approval."

(To which last statement of the court so given in his instructions to the jury the plaintiff at the time objected and excepted.)

"So that I feel bound to say that the approval was with the condition that the plat should not embrace mineral lands as directed by the Commissioner."

(To which statement of the court so given in his instructions to the jury the plaintiff at the time objected and excepted.)

"And if this be the correct construction of the papers and documents and of the act of the surveyor general in making the approval, nothing thereafter done by the officers of the Land Department in the way of declaring what the force and effect of the approval might be would at all change the character of the transaction, or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made."

(To which last statement of the court in his instructions to the jury the plaintiff at the time objected and excepted.)

"There are several communications from the department to persons who were more or less interested in the tract, or who assumed to have some interest in it, in which the Commissioner or some one connected with the department, assume to say that the
179 matter of the mineral character of the land was passed upon at the time of the approval of the survey. I cannot give to these communications any effect whatever."

(To which statement of the court so contained in his instructions to the jury the plaintiff at the time objected and excepted.)

"We must assume that the Commissioner had no authority to thus construe the decision of his predecessor in office or to give it any other effect than that which it appears to have from the letter of February 12th, 1864."

(To which instruction of the court the plaintiff at the time objected and excepted.)

"Upon all this, gentlemen, I feel compelled to state to you upon the principal matter embraced in the case, that the act of June 21st, 1860, and what was done under that act from time to time, did not vest in the grantees of Luis Maria Baca, and their successors in interest, the mineral lands which may be within the tract located."

(To which instruction of the court so given to the jury the plaintiff at the time objected and excepted.)

"This, of course, has no effect whatever upon such part of the tract which seems to be far the greater part as is not mineral. That which is pastoral and agricultural only, and cannot be correctly described as mineral land and it would doubtless pass under the grant without any question whatever such as is presented to us here.

The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant and which he claims as a mine is embraced in the grant to the heirs of Luis Maria Baca, there is, of course, nothing left for you to do, but to return a verdict upon the testimony for the defendant in the suit."

(To which last instruction, and each part thereof, so given to the jury, the plaintiff at the time objected and excepted.)

And thereupon under the instruction of the court as aforesaid the jury returned the verdict in favor of the defendant heretofore set out in the record.

To which verdict and the returning of the same the plaintiff at the time objected and excepted.

180 And thereupon judgment was entered in this cause in favor of the defendant, as hereinbefore set out in the record.

To the entering of which judgment the plaintiff at the time objected and excepted.

And thereupon the plaintiff asked and was allowed by the court sixty (60) days within which to present his bill of exceptions in this cause.

And thereupon, on motion of the plaintiff, by his counsel, made in open court, it was by the court ordered that in the event that the plaintiff shall desire to prosecute a writ of error to the circuit court of appeals for the purpose of reviewing the decision in this cause, there shall be certified by the clerk of this court direct to the circuit court of appeals the original exhibits introduced in evidence in this cause numbered and designated as follows, to wit:

No. 15. Photograph of Crestone mountains at the initial corner of Baca Grant No. 4.

No. 16. Photograph of Crestone mountains adjacent to grant.

No. 22½. Official map of the United States accompanying the report of the Secretary of the Interior for the year 1864.

No. 23. Official map of Colorado for the year 1866.

No. 25. Transcript of part of official map of Colorado for the year 1868.

No. 29. Plat prepared by Professor P. H. Van Diest, showing lands adjacent to initial corner.

No. 34. Plat of completion survey of northeast corner of Baca Grant No. 4.

No. 35. Manual of instruction to surveyors general, of date February 22nd, 1855.

No. 36. Model and the parts thereof showing profiles of mountains near initial corner.

No. 37. Plat of profiles on natural and exaggerated scale prepared by Mr. Duval.

No. 38. Plat of profiles on exaggerated scale prepared by Mr. Duval.

No. 39. Map of Baca Grant No. 4, showing mountains at northeast corner as determined by the witness Darby.

181 No. 40. Hayden's geological and topographical map for part of Colorado.

No. 41. Official map of Colorado for the year 1892.

And it was ordered by the court that said originals should be certified to the said circuit court of appeals in lieu of inserting copies thereof in the record.

And inasmuch as the foregoing matters do not otherwise sufficiently appear of record, the plaintiff now here tenders this his bill

of exceptions, and prays that the same may be signed, sealed and made a part of the record; which is done accordingly this first day of June, A. D. 1895.

[SEAL.]

MOSES HALLETT,
Dist. Judge.

Indorsed: 2978. Quincy A. Shaw *vs.* Murray M. Kellogg. Bill of exceptions. Filed Jun- 1, 1895. Robert Bailey, clerk.

UNITED STATES OF AMERICA, }
Eighth Circuit. }

Assignment of Errors.

In the Circuit Court of Appeals.

QUINCY A. SHAW, Plaintiff in Error, }
vs.
MURRAY M. KELLOGG, Defendant in Error. }

The plaintiff in error, who was plaintiff in the court below, says there is manifest error in the judgment and proceedings of the court below in this cause, in this, to wit:

1. The court erred in sustaining the motion of the defendant that the jury be directed to return a verdict in defendant's favor, to which ruling of the court the plaintiff at the time excepted.

2. The court erred in directing the jury to return a verdict for the defendant, to which direction of the court the plaintiff at the time excepted.

3. The court erred in its instructions to the jury in this: That having instructed the jury that if the officers of the Land Department at Washington had passed upon the conclusiveness of the grant, and had declared in terms that the land was not mineral, this determination might be binding as against subsequent claimants, the court further instructed the jury as follows: "It
182 seems, upon an examination of the testimony which has been offered to you, that no such determination was made;" to which last instruction of the court so given to the jury the plaintiff at the time excepted.

4. The court erred in instructing the jury as follows: "The communication upon which the surveyor general of the Territory of Colorado approved the plat and the notice of survey, expressly required in making such approval that it should be declared that the lands within the tract were not regarded as mineral;" to which instruction of the court the plaintiff at the time excepted.

5. The court erred in his instructions to the jury, in this, to wit: that after having stated to the jury as follows: "The instruction of the Commissioner of the General Land Office, as found in a letter of the surveyor general of Colorado of date February 12th, 1864, is that he will be authorized to approve the plat upon finding it to be correct, in the usual way, and the Commissioner adds: 'In your certificate of approval you will add the special reservation stipulated by this statute, but not to embrace mineral land nor to interfere with any

other vested rights, if such exist,'" the court then further instructed the jury as follows: "That is to say, the surveyor general of Colorado was authorized to approve the plat in so far as it did not embrace mineral land;" to which last instruction of the court the plaintiff at the time excepted.

6. The court erred in his instructions to the jury in the following statement, to wit: "The Commissioner of the General Land Office, apparently, expressly declining to decide the question whether the land selected was or was not of that character," to which statement so given in his instructions to the jury the plaintiff at the time excepted.

7. The court erred in his instructions to the jury in this: That after stating, "It is true that the surveyor general did not put these words in his approval. In the approval which he in fact made he said that it was subject to the provisions of the act of June 21st, 1860," the court then further instructed the jury as follows: "Taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the approval," to which last statement of the court so given in his instructions to the jury the plaintiff at the time excepted.

8. The court erred in his instructions to the jury in the following statement, to wit: "So that I feel bound to say that the ap-
183 proval was with the condition that the plat should not embrace mineral lands, as directed by the Commissioner," to which instruction the plaintiff at the time excepted.

9. The court further erred in giving to the jury the following instruction, to wit: "And if this be the correct construction of the papers and documents, and of the act of the surveyor general in making the approval, nothing thereafter done by the officers of the Land Department, in the way of declaring what the force and effect of the approval might be, would at all change the character of the transaction, or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made," to which instruction of the court the plaintiff at the time excepted.

10. The court erred in his instructions to the jury in this, to wit: That after having stated to the jury as follows: "There are several communications from the department to persons who were more or less interested in the tract, or who assumed to have some interest in it, in which the Commissioner, or some one connected with the department, assume to say that the matter of the mineral character of the land was passed upon at the time of the approval of the survey," the court then further instructed the jury as follows: "I cannot give to these communications any effect whatever;" to which last statement and conclusion of the court so given in his instructions to the jury the plaintiff at the time excepted.

11. The court erred in instructing the jury as follows: "We must assume that the Commissioner had no authority to thus construe the decision of his predecessor in office, or to give it any other effect than that which it appears to have from the letter of February 12th,

1864;" to which instruction of the court the plaintiff at the time excepted.

12. The court further erred in instructing the jury as follows: "Upon all this, gentlemen, I feel compelled to state to you, upon the principal matter embraced in the case, that the act of June 21, 1860, and what was done under that act from time to time, did not vest in the grantees of Luis Maria Baca, and their successors in interest, the mineral lands which may be within the tract located;" to which instruction of the court to the jury the plaintiff at the time excepted.

13. The court further erred in instructing the jury as follows: "The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant, and which he claims as a mine, is embraced in the grant to the heirs of Luis Maria Baca, there is of course nothing left for you to do but return a verdict upon the testimony for the defendant in the suit;" to which instruction of the court and each part thereof the plaintiff at the time excepted.

184 14. The court erred in permitting the jury to return and in receiving a verdict in favor of, the defendant; to which action of the court the plaintiff at the time excepted.

15. The court erred in entering judgment in this cause in favor of the defendant; to which action of the court the plaintiff at the time excepted.

For which errors the plaintiff in error prays that the judgment of the court below be in all things reversed.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
Attorneys for Plaintiff in Error.

(Indorsed:) No. 2978. U. S. circuit court of appeals, eighth circuit. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg, defendant in error. Assignment of errors. Filed Jun- 14, 1895. Robert Bailey, clerk. Wolcott & Vaile, att'ys for pl'ff in error.

6-12/'95.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents, that we, Samuel N. Wood and Henry R. Wolcott are held and firmly bound unto Murray M. Kellogg in the full and just sum of five hundred dollars, to be paid to the said Murray M. Kellogg, his heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifteenth day of June in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, lately at the May term A. D. 1895, of the circuit court of the United States, for the district of Colorado, in a suit pending in said court between Quincy A. Shaw, plaintiff, and Murray M. Kellogg, defendant, judgment was rendered against the said plaintiff,

Quincy A. Shaw and the said Quincy A. Shaw having obtained a writ of error to the United States circuit court of appeals, for the eighth circuit, to reverse the judgment of said court, and a citation directed to the said Murray M. Kellogg citing and admonishing him to be and appear, in the United States circuit court of appeals, for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said Quincy A. Shaw shall prosecute said writ of error to effect and answer all damages and costs, if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

185 SAMUEL N. WOOD. [SEAL.]
HENRY R. WOLCOTT. [SEAL.]

Sealed and delivered in presence of—
J. F. VAILE.

Approved June 15th, 1895.

MOSES HALLETT, *Judge.*

Justification.

THE UNITED STATES OF AMERICA, *District of Colorado,* } ss:

Samuel N. Wood and Henry R. Wolcott, sureties on the within bond, being each first duly sworn, deposes and saith he is worth in —— the sum below set opposite his name, that is to say:

As to S. N. Wood more than one thousand dollars;

As to Henry R. Wolcott more than one thousand dollars, over and above all his just debts and liabilities, and in property subject to levy and sale upon execution.

SAMUEL N. WOOD.
HENRY R. WOLCOTT.

Subscribed and sworn to before me, at Denver, this 15th day of June, A. D. 1895.

[SEAL.] COLIN A. CHISHOLM,
Notary Public.

My commission expires July 10th, 1895.

(Indorsed:) Gen. No. 2978. Circuit court of the United States, district of Colorado. Quincy A. Shaw *vs.* Murray M. Kellogg. Bond on appeal, $5,000. Filed this 18th day of June, A. D. 1895. Robert Bailey, clerk.

10255

Writ of Error to the United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the May term, 1895, thereof, between Quincy A. Shaw, plaintiff, and Murray M. Kellogg, defendant, a manifest error hath happened, to the great damage of the said Quincy A. Shaw, plaintiff in
186 said cause, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, on or before the first day of August, 1895, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of June, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the 119th year. Issued at office in Denver, in said district, with the seal of the circuit court of the United States for the district of Colorado, and dated as aforesaid.

Seal United States Circuit Court, District of Colorado.

ROBERT BAILEY,
Clerk Circuit Court United States, District of Colorado.

Allowed by—
MOSES HALLETT, *Judge.*

Return.

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In obedience to the command of the within writ, I herewith transmit to the honorable, the United States circuit court of appeals

a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court of the United States for the district of Colorado, at Denver, in said district, this 19th day of June, 1895.

ROBERT BAILEY, *Clerk*,
By CHARLES W. BISHOP,
Deputy Clerk.

187 DISTRICT OF COLORADO, *ss*:

The plaintiff in error, having served this writ, by lodging a copy thereof in the clerk's office where the record remains, and having given the security required by law, on the issuing of this citation, within the time required by law, this writ — therefore a supersedeas.

Seal United States Circuit Court, District of Colorado.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court of the United States, for the district of Colorado, at Denver, in said district, this — day of ——, A. D. 189–.

—— ——, *Clerk.*

Gen. No. 2978. United States circuit court of appeals, eighth circuit. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg, defendant in error. Writ of error to circuit court U. S., district of Colorado. Filed in United States circuit court, district of Colorado, this 18th day of June, A. D. 1895. Robert Bailey, clerk. Wolcott & Vaile, attorney- for plaintiff in error.

Citation.

United States Circuit Court of Appeals.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

The United States of America to Murray M. Kellogg, Greeting:

You are hereby cited and admonished to be and appear, in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the district of Colorado, sitting at Denver, in said district, wherein Quincy A. Shaw is plaintiff in error, and you are defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 15th day of June, in the year of our Lord one thousand eight hundred and ninety-five.

MOSES HALLETT,
Judge of Circuit Court.

188 *Proof of Service.*

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

Service of the within citation is hereby acknowledged for and on behalf of Murray M. Kellogg, defendant in error within named, this 15th day of June, A. D. 1895.

JOHN R. SMITH,
Att'y for Def't in Error, Murray M. Kellogg.

P. O. address, 415 Charles bldg., Denver, Colo.

Gen. No. 2978. United States circuit court of appeals, eighth circuit. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg, defendant in error. Citation. Filed in United States circuit court for the district of Colorado, this 18th day of June, A. D. 1895. Robert Bailey, clerk. Wolcott & Vaile, attorney- for plaintiff in error.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

I, Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from No. 1 to No. 284, both inclusive, to be a true, perfect and complete transcript and copy of the record and proceedings and of all thereof heretofore filed or had and entered of record in said court, and in a certain cause lately in said court pending, wherein Quincy A. Shaw was plaintiff and Murray M. Kellogg was defendant, as fully and completely as the same still remain on file or of record in my office, at Denver.

Seal United States Circuit Court, District of Colorado

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 19th day of June, A. D. 1895.

ROBERT BAILEY, *Clerk,*
By CHARLES W. BISHOP,
Deputy Clerk.

Filed Jun- 22, 1895.

JOHN D. JORDAN, *Clerk.*

189 (*Appearance for Defendant in Error.*)

And on the twenty-second day of June, A. D. 1895, an appearance of counsel for defendant in error was filed in the office of the clerk of said circuit court of appeals in said cause in the words and figures following:

UNITED STATES OF AMERICA, } ss:
Eighth Circuit, }

In the Circuit Court of Appeals for the Eighth Circuit.

In re QUINCY A. SHAW, Plaintiff in Error,
vs.
MURRAY M. KELLOGG, Defendant in Error. } No. 664.

I do hereby certify that I have been retained by and appear in the above-entitled cause for and in behalf of Murray M. Kellogg, the defendant in error above named.

JOHN R. SMITH,
Att'y for M. M. Kellogg, Def't in Error.

Dated at Denver, Colorado, this 15 day of June, A. D. 1895.
Address: 415 Charles bldg., Denver, Col.

Endorsed: No. 664. *In re* Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg, defendant in error. Appearance of defendant in error. Filed Jun- 22, 1895. John D. Jordan, clerk. John R. Smith, Denver, Col., counsel for def't in error.

(*Appearance for Plaintiff in Error.*)

And on the twenty-sixth day of June, A. D. 1895, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

190 United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

QUINCY A. SHAW, Plaintiff in Error,
vs.
MURRAY M. KELLOGG. } No. 664.

The clerk will enter my appearance as counsel for the plaintiff in error.

JOEL F. VAILE.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1895. No. 664. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg. Appearance. Filed Jun- 26, 1895. John D. Jordan, clerk. Joel F. Vaile, Denver, Col., counsel for pl'ff in error.

(*Order of Argument.*)

And on the thirteenth day of January, A. D. 1896, in the record of the proceedings of said circuit court of appeals is an order of argument in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1895.

MONDAY, *January* 13, 1896.

QUINCY A. SHAW, Plaintiff in Error,
vs.
MURRAY M. KELLOGG, Defendant in Error. } No. 664.

In error to the circuit court of the United States for the district of Colorado.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Joel F. Vaile, in behalf of the plaintiff in error, and continued by Mr. John R. Smith, for the defendant in error; but, not being concluded at the hour of adjournment, further argument was postponed until tomorrow morning.

191 (*Order of Submission.*)

And on the fourteenth day of January, A. D. 1896, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1895.

TUESDAY, *January* 14, 1896.

QUINCY A. SHAW, Plaintiff in Error,
vs.
MURRAY M. KELLOGG, Defendant in Error. } No. 664.

In error to the circuit court of the United States for the district of Colorado.

This cause, having been called this day for further hearing, argument was continued by Mr. John R. Smith and Mr. Murray M. Kellogg, for the defendant in error, and concluded by Mr. Joel F. Vaile, for the plaintiff in error; thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Order to Certify Questions.*)

And on the thirtieth day of March, A. D. 1896, in the record of the proceedings of said circuit court of appeals is in order to certify certain questions to the Supreme Court of the United States in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1895.

MONDAY, *March* 30, 1896.

QUINCY A. SHAW, Plaintiff in Error,
vs.
MURRAY M. KELLOGG, Defendant in Error. } No. 664.

In error to the circuit court of the United States for the district of Colorado.

In this cause it is now here ordered that certain questions arising upon the record be, and the same are hereby, ordered to be certified to the Supreme Court of the United States under the provisions of section six of the act of March 3, 1891, for the instruction of the said Supreme Court upon said questions.

192 (*Certificate of Questions.*)

And on the thirtieth day of March, A. D. 1896, a certificate of questions to the Supreme Court of the United States was filed in the office of the clerk of said circuit court of appeals in said cause in the words and figures following:

193 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1895.

QUINCY A. SHAW, Plaintiff in Error, *vs.* MURRAY M. KELLOGG, Defendant in Error.	No. 664. In Error to the Circuit Court of the United States for the District of Colorado.

The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Louis, Missouri, on this 30th day of March, A. D. 1896, hereby certifies that upon the record on file in said court in the case wherein Quincy A. Shaw is plaintiff in error and Murray M. Kellogg is defendant in error, and which cause is now pending before this court upon a writ of error duly sued out to review the judgment in favor of the defendant in error which was rendered by the United States circuit court for the district of Colorado, the following facts are made to appear:

1. Quincy A. Shaw, the plaintiff in error, brought an action of ejectment in the circuit court for the district of Colorado against Murray M. Kellogg for the possession and title to the following specifically described premises, situated within the outer boundaries of Baca Grant No. 4, to wit: Section twenty-two (22), township one (1) north, — one (1) east, according to the plat of said Baca Grant No. 4 as filed and recorded in the office of the county clerk and recorder of said Saguache county, in the State of Colorado, including in said section twenty-two certain mineral-bearing property desig-

nated by the defendant as the Eastern Star mine, and other mining lands adjacent thereto within said section twenty-two.

2. The plaintiff alleged in his complaint that the amount in controversy was more then two thousand dollars; that he was the owner of Baca Grant No. 4 and entitled to the possession of all thereof, including the said section twenty-two; that the defendant had entered upon and ousted him from the possession thereof and still unlawfully withheld the same; that the matter in dispute in this action arises under an act of Congress entitled "An act to confirm certain private land claims in the Territory of New Mexico," approved June 21, 1860; that the plaintiff claims that by virtue of said act and the finding of the surveyor general as to the non-mineral character of said land the title to the premises in dispute vested in the heirs of Luis Maria Baca and through them in the plaintiff, although subsequent discoveries of precious metals were made upon the lands here in controversy; while the defendant, on the other hand, claims that under the proper construction of said act of Congress and the finding of the surveyor general the subsequent discovery of precious metals upon the premises in controversy excluded the same from the grant made under said act.

3. The defendant answered. In his answer he denied that the plaintiff was the owner of the section twenty-two described in the complaint or of the mine situated thereon or any of the ad-
194 jacent mining property thereon, or that he was entitled to the possession thereof. He denied that the location of the lands in controversy under said act of Congress was ever approved by the proper officers of the Land Department of the United States, or that the surveyor general of Colorado was authorized to or did certify that the lands in dispute were non-mineral, and he alleged that at the time of their location they were known to be mineral lands.

He averred that on April 24, 1876, the land in dispute, where the Eastern Star mine is now located, was unappropriated public mineral land of the United States, and as such was subject to exploration and location; that thereupon the grantors of the defendant discovered a vein of quartz bearing gold and silver thereon, and thereupon took possession thereof and duly located their mining claim thereon; that they and their successors in interest have performed annually from that time until said answer was filed the requisite labor and made the necessary improvements to entitle them to the possession and ownership of said mining claim and the premises in dispute under and pursuant to the mining laws of the United States.

The plaintiff filed a replication to this answer.

4. The case proceeded to trial before the court and a jury and the plaintiff introduced evidence in support of the allegations of his complaint and rested his case. When he closed his evidence the following facts stood admitted by the pleadings or had been proved by the evidence which he had introduced:

A. The land in controversy in this suit was worth more than two thousand dollars and was mineral land, but there was no proof that

it was known to be such prior to A. D. 1876, and it was within the limits of Baca Grant No. 4.

B. The act of Congress entitled "An act to confirm certain private land claims in the Territory of New Mexico," approved June 21, 1860 (12 Stat., 72), contained the following section:

"SEC. 6. And be it further enacted, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: Provided, however, that the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer."

C. Under this section the action indicated by the following communications and certificates was taken by the Commissioner of the General Land Office and the surveyors general of New Mexico and Colorado respectively:

195 "SURVEYOR GENERAL'S OFFICE,
"SANTA FÉ, NEW MEXICO, *December 8th*, 1860.

"Hon. Thomas Cabeza de Baca, legal representative of the heirs of Don Luis Maria Baca, dec'd.

"SIR: I hereby certify that the grant to the town of Las Vegas has been surveyed under instructions from this office, and according to the laws of the United States, and that the acres of said tract of land *is* 496,446.96 acres.

"Under the act of Congress approved June 21st, 1860 (see Statutes at Large, page 71), the heirs of Luis Maria Baca are entitled to select in not more than five square bodies, the amount of land equal to said area, upon any of the unoccupied lands, not mineral, of New Mexico, and the surveyor general is authorized to survey and locate the same. Therefore I notify you that this office is ready to cooperate with you and receive your application for the location of the lands granted by the Government.

"A. P. WILBAR,
"*Surveyor General of New Mexico.*"

"SURVEYOR GENERAL'S OFFICE,
"SANTA FÉ, NEW MEXICO, *December 8th*, 1860.

"SIR: Enclosed please find duplicate of the certificate in regard to the Las Vegas grant issued from this office to the legal representatives of the heirs of Luis Maria Baca.

"Yours very respectfully, A. P. WOLBAR,
"*Surveyor General.*

"Hon. Jos. S. Wilson, Com'r Gen'l Land Office."

"SURVEYOR GENERAL'S OFFICE,
"SANTA FÉ, *February 9th*, 1863.

"SIR: Please find enclosed herewith the application of the heirs of Luis Maria Baca, to locate one-fifth of the private claim confirmed to them under the act of Congress approved June 21, 1860. The location falls within the Territory of Colorado, but within the limits of New Mexico as they existed at the date of the approval of the act confirming this claim.

"I have transmitted a copy of the enclosed to the surveyor general of Colorado, to enable him, when required to make the survey.

"I am very respectfully, your ob't serv't,

"JOHN A. CLARK,
"*Surveyor General of New Mexico.*

"Hon. J. M. Edmunds, Com'r of General Land Office, Washington city, D. C."

"SURVEYOR GENERAL'S OFFICE,
"SANTA FÉ, NEW MEXICO, *February 5th*, 1863.

"I, John A. Clark, surveyor general of New Mexico, do hereby certify that on this day John S. Watts, Esq., in behalf of the heirs of Luis Maria Cabeza de Baca, filed in this office an application in the words and figures following, viz:

196 "'SANTA FÉ, NEW MEXICO, *December 12th*, 1862.

To Surveyor General John A. Clark, surveyor general of New Mexico:

I, John S. Watts, attorney of the heirs of Luis Maria Baca, have this day selected as one of the five locations, belonging to the said heirs, under the 6th section of the act of Congress approved June 21st, 1860, a tract of land in the Territory of New Mexico, described as follows:

Beginning at a point on the eastern edge of the valley of San Luis where the thirty-eighth parallel of north latitude crosses the base of the snowy range, dividing the waters of the Rivers Arkansas and Del Norte, thence east along said parallel four and one-half miles, thence south along a meridian line twelve miles, thirty-six chains and forty-four links distance, thence west at a right angle twelve miles thirty-six chains and forty-four links distance, thence north to the said specified parallel of latitude, thence east with said parallel to the place of beginning.

I further state that the said land is entirely vacant, not claimed by any one, is not mineral, but located for purposes of arable and pastoral agriculture, and is within the limits of the Territory of New Mexico as established in the organic act. I hereby accordingly make application for the survey and location of the tract of land in accordance with the provisions of the above act of Congress.

JOHN S. WATTS,
Attorney for Heirs of Luis Maria Baca.'

"And I further certify that the said tract of land being the one-fifth part of the private claim confirmed to said heirs, contains

ninety-nine thousand, two hundred and eighty-nine acres and thirty-nine hundredths of an acre, and that this location is the fourth of the series, and with the three locations heretofore made, numbered one, two & three, includes four-fifths of the said private claim confirmed to the heirs of Luis Maria Cabeza de Baca by the act of Congress approved June 21, 1860.

"In witness whereof I have hereunto set my name this fifth day of February, A. D. 1863.

"JOHN A. CLARK,
"*Surveyor General of New Mexico.*"

"SURVEYOR GENERAL'S OFFICE,
"DENVER, Co. Ty., *Feb'y 24th*, 1863.

"Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C.

"SIR: I have the honor to report that I have this day received from the surveyor general of New Mexico a copy of the application of the att'y of the heirs of Luis Maria Baca for the location of one of the five locations belonging to said heirs under the act of June 21st, 1860, dated December 12th, 1862. The description of the tract selected is as follows: 'Beginning at a point (?) on the eastern edge of the valley of San Luis where the thirty-eighth parallel of north latitude crosses the base of the snowy range dividing the
197 waters of * * * the River- Arkansas and Del Norte, thence east along said parallel four and one-half miles, thence south along a meridian line twelve miles, thirty-six chains and forty four links distance, thence west at a right angle twelve miles, thirty-six chains and forty-four links distance, thence north to the said specified parallel of latitude, thence east with said parallel to the place of beginning.'

"I suppose this selection has been made by ex-Gov. Gilpin, as he told me last summer he was in possession of one of the Baca 'floats' and should locate it as this is located for the reason that, in his opinion, it would cover rich minerals in the mountains.

"Very truly yours ob't serv't,

"FRANCIS M. CASE,
"*Surv. Gen'l Colo. & Utah.*"

"GENERAL LAND OFFICE, *March 13th*, 1863.

"Surveyor general, Colorado and Utah, Denver city, Colorado Ty.

"SIR: I am in receipt of your communication dated the 24th of February last, reporting that you have received from the surveyor general of New Mexico a copy of the application of the attorney of the heirs of Luis Maria Baca for the location of one-fifth of the private claim confirmed to said heirs, the location being within the limits of New Mexico as they existed at the date of the confirmation, but falling within what is now the Territory of Colorado.

"It is necessary before the application can be approved by this office that it be accompanied by the certificates of the surveyor general and the register & receiver that the land selected is vacant and

not mineral. This is in accordance with our instructions to the surveyor general of New Mexico, extracts from which were furnished your office in our communication of June 7th, 1862, especially should the character of the location as to minerals be carefully ascertained after the important statement of ex-Governor Gilpin which you communicated in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable you to do, you will transmit to this office your official certificate setting forth these facts.

"You will also correspond with the register and receiver of Colorado when they enter upon their official duties, communicating to them the substance of this communication, and call upon them to furnish their certificate, when able, under the same conditions that your own is to be furnished under, which, when received, you will forward to this office.

"Very respectfully, your ob't serv't,

"JOS. S. WILSON,
"*Acting Commissioner.*"

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *Oct. 13th*, 1863.

"SIR: On the 3d day of October of the present year William Gilpin, as representative of the heirs of Luis Maria Baca, filed in this office an application for the survey of Grant No. 4 of the grants confirmed *by* the said heirs by act of Congress of June 21st, 1860, a copy of which application is herewith submitted. 198

"Mr. Gilpin further represented that he was desirous of taking immediate possession and improving the said grant, and that to do so it would be necessary to have the survey made during the next six weeks to avoid the deep snow which would render the survey impossible.

"I informed him that the instructions in this office forbid making the survey of any grant situated more than six miles from existing lines of public surveys, but as his grant was in a part of the country which it would probably be some time before the lines of survey would reach I would order the survey and make a contract subject to your approval. A copy of my reply to his application is herewith submitted.

"As there is yet no United States depository in operation in this country, Mr. Gilpin deposited the money with me and took my receipt for the same, a copy of which receipt is herewith enclosed. The money is in my hands subject to your order as to the disposition of it, but in case of the non-approval of the contract, the money was to remain in my hands until the survey was finished and to be paid to the deputy for the work done, the survey being considered private and not official. This was done in order to secure myself and the deputy, as Mr. Gilpin wished the deputy to take the field immediately.

"I transmit herewith the copy of a contract made with Deputy

Surveyor A. Z. Sheldon for the survey of the above-mentioned grant and also my instructions to said deputy. I have acted in this matter as in my judgment seemed best under the circumstances, and hope it will meet your approval.

"Very respectfully, your ob't serv't,

"JOHN PIERCE,

"*Surveyor General of Colorado and Utah.*

"Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C."

"GENERAL LAND OFFICE, *November 2nd*, 1863.

"John Pierce, Esq., surveyor general, Denver, Col. Ter.

"SIR: In reply to your communication of the 12th ultimo covering contract—instructions and contract—with Deputy Surveyor A. Z. Sheldon for the survey of Grant No. 4 of the Baca heirs, I have to say this office cannot approve said contract. In your letter dated the 10th March last, transmitting the application of the attorney of said heirs for the location of this claim, you say, 'I suppose this selection is being made by ex-Gov. Gilpin, as he told me last summer he was in possession of one of the Baca floats and should locate it as this is located, for the reason that in his opinion, it would cover rich minerals in the mountains.'

"Upon receipt of your letter you were expressly informed, under date of the 13th March, 1860, that before the application
199 could be approved it must be accompanied by the certificates of the surveyor general and the register and receiver that the land is vacant and not mineral, and I then took occasion to communicate the following explicit instructions: 'Especially should the character of the location as to minerals be carefully ascertained after the important statement of ex-Gov. Gilpin, which you communicate in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in the selection are vacant and not mineral, to enable you to do so you will transmit to this office your official certificate setting forth these facts.'

"In our communication of the 7th June, 1862, you were also furnished with extracts from our instructions to the surveyor general of New Mexico, referring to the location of these claims, in which it was plainly indicated that should selections be made outside of the existing surveys, the survey thereof must be postponed until the vicinity is reached by the regular progress of the public surveys. You will be guided in your official acts by our instructions, which are full and explicit in relation to the location of the claims referred to. The contract and instructions for the survey of the above-mentioned claim are herewith returned.

"Very respectfully, your ob't serv't,

"J. M. EDMUNDS,

"*Commissioner.*"

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *Dec. 12th*, 1863.

"SIR: I have the honor to acknowledge the receipt of your letter of the 2nd of Nov. last, disapproving of the contract for the survey of Grant No. 4 of the floats belonging to the heirs of Luis Maria Baca.

"I herewith transmit my certificate that the lands are 'not mineral and are vacant.' You refer to a letter of the former surv. gen'l of this district, in which he says that he supposes that this location was made by Mr. Gilpin, 'for the reason that, in his opinion, it would cover rich mineral lands.' I do not believe that at the time Mr. Case wrote that letter he had the least idea that the float as located covered any mineral lands. I have signed the accompanying certificate partly from my own knowledge of the country, but mostly from the following reasons:

"1st. The discoveries of gold thus far go to show that the gold lands of Colorado commence at the base of Long's peak and extend in a course about 30° west of south to the head-waters of the San Juan, covering a belt of country about 30 miles in width, of which the line indicated will be near the western boundary; outside of this no gold or silver lodes have been discovered.

"2nd. The grant is located on the great line of travel between Denver and Santa Fé, and thousands of experienced miners have been travelling *of* the Sangre de Christo and Mosca passes and have found no gold or other valuable minerals.

"3rd. In the summer of 1860 a party of one hundred and
200 fifty miners from here, under one Roeder, went to the San Luis valley and prospected the whole of the Sangre de Christo range, but found no gold anywhere on the eastern run of the park. Many of the men who were in this expedition have been in my employ, and from them I have had this history of the expedition.

"Such are the grounds on which I have signed the certificate, and to me they are satisfactory.

"The survey as made by Mr. Sheldon is probably as near perfect as can be made, as the mountains at the northeast corner of the grant are inaccessible at any time of the year.

"I have refunded to Mr. Gilpin the money placed in my hands, and he has paid for the survey as a private survey, though he has permitted me to make an abstract of the field-notes, which I have placed on file in this office.

"Your letter of November 16th, granting me a leave of absence, is also received. The cold weather has so protracted the surveys that I cannot avail myself of it, though it is possible that I may wish to visit the States some time during the winter or spring.

"Very truly, your ob't serv't, JOHN PIERCE,
"*Surv. Gen'l of Colorado & Utah.*

"Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington D. C."

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *Dec. 5th*, 1863.

"SIR: This is to certify that from good and sufficient evidence I am perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their Grant No. 4, in the San Luis valley, and marked out by a survey made by Albinus Z. Sheldon in November, 1863, is not mineral and is vacant.

"Very truly, your ob't serv't, JOHN PIERCE,
"*Surveyor General of Colorado and Utah.*"

"GENERAL LAND OFFICE, *January 16th*, 1864.

"John Pierce, Esq., surveyor general, Denver city, C. T.

"SIR: Your letter of the 14th Dec. last, with inclosed certificate relating to the 4th location of the Baca heirs, is received.

"The act of 21st of June, 1860, confirming the claim of Luis Maria Baca, authorized the heirs of said Baca to select in lieu of the tract claimed by the town of Las Vegas an equal quantity of vacant land not mineral. With a view to carry out the requirements of the law, the surveyor general of Colorado was required in our instructions of June 7th, 1862, to accompany the final rendition of the certificate with his own statement, and also that of the register and receiver setting forth the fact that the land selected is vacant and not mineral. Those instructions were reiterated in our letter of March 13th, 1863.

"The evidence furnished by you is not sufficient, in the opinion of this office, to prove that the selection No. 4 does not cover valuable mineral deposits. Your certificate is not based upon
201 actual knowledge of the facts, but upon the information and conclusions deduced from reasoning. This kind of proof is not deemed sufficient when large public interests may be involved, and the character of the location is made still more doubtful by the statement of ex-Governor Gilpin, officially communicated to this office by Surveyor General Case, that there are mineral lands in that locality.

"The statement of the register and receiver, required in our instructions, is also wanting.

"The approval of the selection will stand suspended until some satisfactory proof is obtained upon the points indicated.

"Very respectfully, your ob't serv't,
"J. M. EDMUNDS,
"*Commissioner.*"

"GENERAL LAND OFFICE, *February* 12, 1864.

"John Pierce, Esq., surveyor general, Denver city, Colo.

"SIR: I have considered your report of the 14th December last respecting the survey made in November, 1863, by Deputy Surveyor Albinus Z. Sheldon, of what is known as the Luis Maria Baca float, in San Luis park, in Colorado, and containing 92,293 acres.

"You transmit your certificate 'that the lands are not mineral and are vacant,' and state under specific heads 'the grounds on

which' you 'have signed the certificate' and which are satisfactory to you. You report further that 'the survey as made by Mr. Sheldon is probably as near perfect as can be made, as the mountains at the northeast corner of the grant are inaccessible at any time of the year.'

"The act of Congress approved 21st June, 1860, U. S. Statutes at Large, vol. 12, page 71, chap. 167, confers authority for the location of the said Baca float in the then Territory of New Mexico, but now a part of Colorado Territory.

"The said statute makes it the 'duty of the surveyor general of New Mexico,' now in your jurisdiction, 'to make survey and location of the lands so selected by the heirs of Baca when thereunto required by them,' with a proviso making a three years' limitation to the statute.

"You further report that you have refunded to Mr. Gilpin the money placed in your 'hands and he has paid for the survey as a private survey, though he has permitted' you 'to make an abstract of the field-notes which' you 'have placed on file in' the surveyor general's office.

"This part of the proceedings is irregular. Under statutory requirements it is obligatory upon private claimants to pay for the survey of confirmed private claims, but the work must be done under the usual obligations and responsibilities both of deputies & surveyor general.

"The difficulty, however, may be avoided by pursuing the following course: The original field-notes, duly verified and
202 authenticated, must be filed in the surveyor general's office of Colorado upon bringing these to the usual satisfactory tests, and finding the same all regular and correct you are authorized in virtue of the aforesaid 6th section of the said act of 21st June, 1860, to approve the said survey, but in your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land nor to interfere with any other vested rights if such exist.

"The statute does not order the issue of a patent. The aforesaid law of 21st June, 1860, with your plat approved in the manner indicated, will therefore constitute the evidence of title.

"You will take care so to arrange the matter that hereafter when in the gradual progress of the lines of the public surveys, they shall reach the Baca location they shall be properly connected therewith and so appear on the township plats.

"Very respectfully, your ob't serv't,

"J. M. EDMUNDS,
"*Commissioner.*"

"GENERAL LAND OFFICE, *Feb'y 26th*, 1864.

"John Pearce, Esq., surveyor general, Denver city, Colorado T.

"SIR: At the request of Wm. Gilpin, Esq., I herewith transmit the following papers, to wit:

"First. Mr. Gilpin's application for the survey of Grant No. 4 of the heirs of Baca, dated Oct. 3rd, 1863.

"Second. Surveyor general's estimate of the cost of said survey, dated October 5th, 1863.

"Third. Surveyor general's receipt for $600, deposited by Mr. Gilpin to pay for the above survey, October 6th, 1863.

"Fourth. Certificate of the register and receiver at Golden city, Colorado, that the lands covered by the said Grant No. 4 are not mineral and are vacant, December 5th, 1863.

"Fifth. The field-notes of the boundary lines of the above grant, together with plat thereof.

"These papers were deposited in this office by Mr. Gilpin and are transmitted to you for such action as you shall deem proper in the premises in accordance with the views expressed in our communication to you, dated the 12th instant.

"Very respectfully, your obedient servant,

"J. N. EDMUNDS,
"*Commissioner.*"

"COLORADO TERRITORY, GOLDEN CITY, *Dec. 5th*, 1863.

"SIR: This is to certify that from good and sufficient evidence we are perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their grant, No. 4, in the San Luis valley, and marked out a survey made by Albinus Z. Sheldon in November, 1863, is not mineral and is vacant.

"G. N. CHILCOTT,
"*Register Land Office, Colo. Dist.*
"C. B. CLEMENTS,
"*Receiver Land Office, Colo. Ty.*"

203 "SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *March 29th*, 1864.

"SIR: I have the honor to acknowledge the receipt of your letter of Feb'y 26th, enclosing field-notes and papers in regard to the survey of Grant No. 4 of the heirs of Luis Maria Baca.

"I herewith enclose transcript of field-notes & plat of said survey. I have furnished ex-Gov. Gilpin with one copy of the plat and retained one in the office.

"Very respectfully, your ob't serv't,

"JOHN PIERCE,
"*Surveyor General of Colorado & Utah.*"

The transcript of the field-notes referred to in the last letter contained the following and no other references to the mineral or non-mineral character of the lands contained in Baca Grant No. 4, viz: "Saw no indications of the precious metals or minerals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle set forth in the notes," and it was accompanied with the following certificate:

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *March 15th*, 1864.

"The foregoing field-notes of the survey of Grant No. 4, heirs of Luis Maria Baca, executed by Albinus Z. Sheldon, under his con-

tract of the 7th day of October, 1863, having been critically examined, the necessary corrections and explanations made, the said field-notes and the survey they describe are hereby approved.

"JOHN PIERCE,
"*Surveyor General of Colorado and Utah.*"

The transcript of the survey referred to in the last letter had the following certificate indorsed thereon:

"The above map of the boundary lines of Grant No. 4, of the heirs of Luis Maria Baca, in San Luis valley, Colorado Territory, as surveyed by Albinus Z. Sheldon, under his contract bearing date the 7th day of October, 1863, is strictly conformable to the field-notes on file in this office, which have been examined and approved, subject to the conditions and provisions of sec. 6 of the act of Congress approved June 21st, 1860.

"Surveyor general's office, Denver, March 18th, 1864.

"JOHN PIERCE,
"*Sur. Gen'l Colo. & Utah.*"

"GENERAL LAND OFFICE, *May 4th*, 1864.

"John Pierce, Esq., surveyor general, Denver city, C. T.

"SIR: Your letter of March 29th last, transmitting transcript & field-notes of the survey of Grant No. 4, of the heirs of Luis Maria Baca, has been received at this office.

"Very respectfully, your ob't serv't,

"J. M. EDMUNDS,
"*Commissioner.*"

204 "DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *January* 14, 1868.

"Hon. J. S. Watts, present.

"SIR: Referring to your application of the 12th inst. for the issuing of patent for the tract of land in Colorado known as 'Baca Tract No. 4,' I have to state that the selection authorized by the 6th section of the act of 21st June, 1860 (Stats., vol. 12, page 72), has been made, and the survey executed and reported to this office; but as no provision is made in the statute for the issuing of patent, the survey and statute are the only authorized evidences of title, this office having no authority to issue patents unless the statute expressly orders the same, which is not done in the Baca case; but 'that a grant may be made by a law as well as a patent pursuant to a law is undoubted (6 Cr., 128). A confirmation by a law is as fully, to all intents and purposes, a grant as if it contained in terms a grant *de novo*.' (12 Peters' Reports of the Decisions of the Supreme Court of the United States, page 454.)

"Very respectfully, your ob't serv't,

"JOS. S. WILSON,
"*Commissioner.*"

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *M'ch 21st*, 1879.

"Mr. Wm. L. Campbell, surveyor gen'l of Colorado.

"SIR: I have considered the application of Hon. Wm. Gilpin for a patent to the tract of land known as Baca Claim No. 4, in Colorado.

"Section six of the act of Congress approved June 21, 1860, provided that the heirs of Luis Maria Baca might select a quantity of land equal to that claimed by the town of Las Vegas, to be located on vacant non-mineral land in New Mexico, in square bodies not to exceed five in number, the same when selected by the heirs to be surveyed and located by the surveyor general of New Mexico.

"It was subsequently ascertained that the quantity of land claimed by the town of Las Vegas, and therefore the amount to be selected by the Baca heirs, was 496,446.96 acres.

"In 1863 the Baca heirs selected the land now in question. This was the fourth tract, three having been previously selected, and therefore this tract was designated as Baca Claim No. 4. It contains 99,289.39 acres being one-fifth of the amount granted to said heirs.

"This was at the time of its selection in the Territory of Colorado; but at the date of the act making the grant, June 21, 1860, the tract was a part of the Territory of New Mexico.

"After the selection of this tract it was surveyed and located by the surveyor general of Colorado, he having first determined that the land was vacant and non-mineral.

"The seventeenth section of the act of Congress approved Feb. 28, 1861, gave the surveyor general of Colorado the same
205 authority concerning the location of this tract as was originally conferred on the surveyor general of New Mexico.

"After the selection, but previous to the location, the Commissioner of the General Land Office instructed the surveyor general of Colorado that as the statute did not authorize the issuing of a patent, the act of June 21, 1860, and the plat approved by the surveyor general would constitute the evidence of title.

"There is no doubt that Government may convey and vest the legal title without issuing a patent as effectually as may be done by a patent. Larriviere *v.* Madegan, 1 Dillon, 455; Gregnon *v.* Aster, 2 Howard, 319; 3 Opinions of Att'y Gen., 350.

"The surveyor general was authorized by the act to locate only vacant non-mineral land. Unless the contrary appeared, it would be presumed from the act of locating that the surveyor general determined the land was not mineral.

"It is now alleged that the land is mineral; that the surveyor general approved the plat of survey 'subject to the conditions and provisions of section six of the act of Congress approved June 21, 1860,' and that, therefore, the grantees cannot hold the land under that act.

"The conditions and provisions of the act of June 21, 1860, were, as respects this question, that the selection and location should be

on land determined at the time of such location, when the title passed, to be non-mineral land.

"The act did not intend that if, at any subsequent time in the remote future, mineral should be discovered the title should be unsettled or that the title should be the subject of controversy through all time, as often as any one might choose to allege its mineral character.

"The surveyor general did not undertake and had no power to impose conditions not in the act.

"If, after fifteen years, the question as to the mineral character of the land may be reopened, why may it not be raised again after the lapse of any number of years? If the question may be reopened as to the land granted under the provisions of the act of June 21, 1860, why may it not as to land acquired under the homestead, pre-emption, and other acts of Congress? Would such titles ever be considered secure?

"The question as to the mineral or non-mineral character of this land has been passed upon by competent authority. The title has passed from the Government and vested in private individuals. This office has no authority to reopen the question. The land cannot longer be regarded as a part of the public domain.

"Mr. Gilpin, who claims this tract of land as the assignee of the Baca heirs, makes personal application for a patent. It is not claimed that the granting act authorized a patent to issue, but that it is authorized by section two of the act approved March 3, 1869 (15 Stat., 342), and by sec. 2447, Rev. Stat. U. S.; but those provisions authorize patent to issue only when claims to land have been confirmed by law—that is, where an act of Congress recognizes a claim to specific land—and does not apply to cases
206 where the acts of Congress only authorize a claim to be made thereafter to land without regard to any specific tract or parcel of land. This office can issue patents only where it is authorized by some act of Congress. The application of Mr. Gilpin for a patent must therefore be refused.

"Very respectfully, J. A. WILLIAMSON,
"*Commissioner.*"

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *June 28th*, 1884.

"W. Niel Dennison, Esq., Cañon City, Colorado.

"SIR: I have received, by reference from the department, your letter of June 12th inst., addressed to the Hon. Secretary of the Interior, relating to the Baca location No. 4 ("Gilpin grant"), in which you inquire, 1st, if said grant is located on mineral or non-mineral land, and, 2nd, if prospectors will be allowed to hold any mineral discoveries made on said No. 4 prior to the year 1880.

"In reply to said inquiries I have to say that by the 6th section of the act of June 21, 1860 (12 Stat., 71), the heirs of Baca were authorized to select the quantity of land awarded to them, in not more

than five square bodies, upon vacant non-mineral land, and it was made the duty of surveyor general to make survey and location of the land selected, of course subject to the conditions imposed as to the character of the land awarded.

"In the case of location No. 4, in question, the surveyor general, having first ascertained and determined that the land selected was vacant and non-mineral, surveyed and located it, and approved the plat of the location March 18, 1864, and this approved plat, in the absence of any provision of law for the issuing of patent, became the evidence of title in the owner of the land so located.

"On a subsequent application by Gov. Gilpin for a patent it was contended before this office that mineral existed in some part of the location, and therefore the grantee could not hold the land under the act. The matter was fully considered and the following conclusion reached:

"'The conditions and provisions of the act of June 21, 1860, were, as respects this question, that the selection and location should be on land determined at the time of such location when the title passed, and to be non-mineral.

"'The act did not intend that, if at any subsequent time in the remote future, mineral should be discovered the title should be unsettled, or that the title should be the subject of controversy through all time, as often as one might choose to allege its mineral character.

"'The surveyor general did not undertake and had no power to impose conditions not in the act.

"'The question as to the mineral or non-mineral character of the land has been passed upon by competent authority; the title
207 has passed from the Government and vested in private individuals, and this office has no authority to reopen the question; the land can no longer be regarded as a part of the public domain.'

"You will see by the foregoing that the land in question was determined in 1864 by the surveyor general, whose province and duty it was, to be non-mineral; the location was then perfected and the title passed. Whether prospectors will be allowed to hold any mineral discoveries thereon prior to or since 1880 must probably rest between them and the holders of the location No. 4.

"Respectfully, N. C. McFARLAND,
"Commissioner."

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *June* 8, 1889.

"Jno. Duncan & Co., Westcliffe, Colo.

"GENTLEMEN: I am in receipt, by reference, of your letter dated the 18th ult., addressed to the Hon. Secretary of the Interior, in regard to mines and minerals within the surveyed limits of 'Baca Claim No. 4,' commonly known as the 'Gilpin grant.'

"In reply I have to say that by the 6th section of the act of Congress approved June 21, 1860, the Baca heirs were permitted to

select a quantity of land equal to that claimed by the town of Las Vegas to be located on vacant non-mineral land in New Mexico, in square bodies, not to exceed five in number, the same, when selected by the heirs, to be located and surveyed by the surveyor general of New Mexico.

"It was subsequently determined that each of said tracts should contain 99,289.39 acres, the one-fifth part of the area claimed by the town of Las Vegas.

"In the year 1863 said heirs selected the tract in question, three other tracts having been previously selected.

"At the time of its selection this tract was in Colorado, but at the date of the act (June 21, 1860) the tract was in the Territory of New Mexico.

"Thereafter Mr. Gilpin, who claimed the land as the assignee of the Baca heirs, applied for a patent, which was denied him for the reason that there was no provision of law for the issuance of patents on these locations.

"Mr. Gilpin was, however, given an approved plat of the official survey of this tract number 4, as evidence of title, in connection with the acts of Congress aforesaid and his purchase from the heirs.

"In determining the various questions involved in the case this office on March 21, 1879, decided that the character of the land involved had already been determined and the matter, therefore, was *res adjudicata*.

"'The question as to the mineral or non-mineral character of this land has been passed upon by competent authority; the title has passed from the Government and vested in private indi-
208 viduals. This office has no authority to reopen the question. The land can no longer be regarded as a part of the public domain,' &c.

"The case has, therefore, become final so far as this office is concerned, and unless authorized to do so by some superior authority I cannot recognize entries or filings as established by the approved survey thereof.

"Very respectfully,

W. M. STONE,
"*Acting Commissioner.*"

5. The plaintiff has through various mesne conveyances succeeded to the rights of the heirs of Luis Maria Baca to the lands covered by Baca Grant No. 4, which include those in controversy in this suit.

6. Upon this state of facts, at the close of the evidence for the plaintiff, the circuit court instructed the jury as follows, and the plaintiff in error excepted to the various portions of the *of the* charge as noted below and has in this court duly assigned those parts of the charge duly excepted to as error, and has also duly assigned the court's instruction to the jury to return a verdict against him as error:

"HALLETT, *J.* (orally):

"This action, gentlemen of the jury, is to recover a small plat of land in what is known as the Baca Grant No. 4, in the San Luis

valley. I think it is — the county of Saguache, but I am not sure whether the county is given in the complaint.

"The plaintiff relies upon an act of Congress passed June 21st, 1860, by which the heirs of Luis Baca were permitted to locate this tract of land. You have heard the testimony at great length as to the way in which the location was made and surveyed and all the proceedings in the land office in respect to it. Objection is made that the location was not within the time limited by the act of Congress, which was three years, and that is put upon the ground that there was no sufficient description of the tract located to make it known to the public at large where the location would be, and upon the ground that the initial point from which the survey of the tract would be extended was not a fixed and determined point. That was declared in the paper filed with the surveyor general of New Mexico to be the point where the 38th parallel of latitude crosses the base of the snowy range which divides the waters of the Arkansas and Del Norte rivers at the eastern edge of the San Luis valley. It is said that this is not sufficient to fix the location, and there should have been some monument or some natural object open to the view of all people from which the lines should be run. Upon that I do not care to enter at length. I shall assume that the testimony which has been delivered before you is sufficient to enable you to determine this point, and that you would determine it under the testimony to have been properly fixed. If the location was so designated as to be understood by the public at large, I am of the opinion that the circumstance that no survey of the location was made within the three years following the passage of the act is not material. A sur-
209 vey was in fact made in the latter part of the year 1863 and about six months after the expiration of the three years mentioned in the act. I assume also that the survey made by Mr. Sheldon was sufficient in form. The lines were not closed at the northeast corner. There were three or four miles of the north line and perhaps a greater length of the east line which were not laid at that time because of the difficulty of traversing the mountains. The surveyor states in his notes that he found it impossible at the season of the year in which he was carrying on the work to proceed over the mountains, and so the lines were not laid at the time. This survey having been accepted by the officers of the Land Department and approved by them, it cannot be alleged that it was not in form sufficient or that there was any defect in it from the circumstance that a portion of the lines were omitted from the survey at the time when it was made.

"Upon that we come to another question, which is the most important in the whole case, and that is whether mineral lands passed by the terms of the act and what was done under it to the grantees therein. The act itself declares that the location of the tract shall be upon lands vacant and not mineral. The grantees, the heirs of Baca, were not at liberty to select mineral land. The complaint describes the land of which the defendant is said to be in possession that point; so that the question presented and simply stated is and which he wrongfully witholds from the plaintiff as mineral

land, so that you have no question to consider whether the lands were or were not of that character. The plaintiff having averred that they have the character of mineral lands, there is no issue upon whether mineral lands passed under the grant of the act of June 21st, 1860, and, as I have said, the grantees under that act, the heirs of Baca, were required to select lands which were not mineral. In any selection which they could make they could not determine the quality of the lands in that respect—that is to say, they could not determine in a manner which would be conclusive upon the Government and upon subsequent claimants under the Government whether the lands were or were not mineral. In order to make a valid determination of that matter there must be some participation by the Government in the selection—that is to say, the Government must investigate and pass upon the question whether the lands selected were or were not mineral.

"And so we come to the question whether anything was done by the Government in that direction at any time whatsoever or up to the time of the approval of the survey of the lands. It is contended for the plaintiff that the act itself and the selection of the lands under it make a good title in the grantees named in the act, and it may be true that no other evidence of title was required. I have not looked into that question particularly whether there was authority in the Government to issue a patent for the land or not. It is said, and it seems to be established by the various communications from the Land Department and the officers of that department, that they constantly maintain that there was no authority in the Government to issue a patent for the land, and therefore they
210 have declined to issue it. Upon all such occasions the officers of that department declared that the act of Congress and the survey with the plat of the land constituted the title of the grantees under the act. No further communication, and no other document or paper could be issued by the Government in confirmation of the title of the grantees. However that may be, if it appeared that the officers of the Land Department in Washington had at any time passed upon the question of the conclusiveness of the grant and had declared in terms that the land was not mineral, or to that effect, it might be said that the grantees took the land as not being mineral, and, whatever its character, that the question was properly decided by the Government and binding upon all who might subsequently make claim to it.

"It seems upon examination of the testimony which has been offered to you that no such determination was made. The communication upon which the surveyor general of the Territory of Colorado approved the plat and the notes of survey expressly required in making such approval that it should be declared that the lands within the tract were not regarded as mineral. The instruction of the Commissioner of the General Land Office, as found in a letter to the surveyor general of Colorado of date February 12th, 1864, is that he will be authorized to approve the plat, upon finding it to be correct, in the usual way, and the Commissioner adds: 'In your certificate of approval you will add the special reservation stipulated by the

statute, but not to embrace mineral land nor to interfere with any other vested rights, if such exist'—that is to say, the surveyor general of Colorado was authorized to approve the plat in so far as it did not embrace mineral land, the Commissioner of the General Land Office apparently expressly declining to decide the question whether the land selected was or was not of that character.

"Now, it is true that the surveyor general did not put these words in his approval. In the approval which he in fact made he said that it was subject to the provisions of the act of June 21st, 1860, and, taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the approval. So that I feel bound to say that the approval was with the condition that the plat should not embrace mineral lands, as directed by the Commissioner, and if this be the correct construction of the papers and documents and of the act of the surveyor general in making the approval, nothing thereafter done by the officers of the Land Department in the way of declaring what the force and effect of the approval might be, would at all change the character of the transaction, or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made.

"There are several communications from the department to persons who were more or less interested in the tract, or who assume to have some interest in it, in which the Commissioner or some one connected with the department assume to say that the
211 matter of the mineral character of the land was passed upon at the time of the approval of the survey. I cannot give to these communications any effect whatever. We must assume that the Commissioner had no authority to thus construe the decision of his predecessor in office or to give it any other effect than that which it appears to have from the letter of February 12th, 1864.

"Upon all this, gentlemen, I feel compelled to state to you, upon the principal matter embraced in this case, that the act of June 21st, 1860, and what was done under that act from time to time did not vest in the grantees of Luis Maria Baca and their successors in interest, the mineral lands which may be within the tract located. This, of course, has no effect whatever upon such part of the tract, which seems to be by far the greater part, as is not mineral. That which is pastoral and agricultural only cannot be correctly described as mineral land, and it would doubtless pass under the grant without any question whatever such as is presented to us here.

"The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant and which he claims is a mine is embraced in the grant to the heirs of Luis Maria Baca, there is, of course, nothing left for you to do but to return a verdict upon the testimony for the defendant in the suit.

"And thereupon the plaintiff by his counsel objected and excepted to certain portions of the instructions so given by the court as hereinafter specifically set forth.

"'The court instructed the jury, among other things, as follows:

"'I think that if it appeared that the officers of the Land Depart-

ment in Washington had at any time passed upon the question of the conclusiveness of the grant and had declared in terms that the land was not mineral, or to that effect, it might be said that the grantees took the land as not being mineral, and whatever its character, that the question was properly decided by the Government and binding upon all who might subsequently make claim to it. It seems upon examination of the testimony which has been offered to you that no such determination was made.'

"(To which last statement of the court so given in his instructions to the jury the plaintiff at the time objected and excepted.)

"'The communication upon which the surveyor general of the Territory of Colorado approved the plat and the notes of survey expressly required in making such approval that it should be declared that the lands within the tract were not regarded as mineral.'

"(To which instruction of the court the plaintiff at the time objected and excepted.)

"'The instruction of the Commissioner of the General Land Office, as found in a letter to the surveyor general of Colorado of date February 12th, 1864, is that he will be authorized to approve the plat, upon finding it to be correct, in the usual way. And the Commissioner adds: "In your certificate of approval you will add the special reservation stipulated by the statute, but not to em-
212 brace mineral land, nor to interfere with any other vested rights, if such exist." That is to say, the surveyor general of Colorado was authorized to approve the plat in so far as it did not embrace mineral land.'

"(To which last statement of the court so given in his instructions to the jury the plaintiff at the time objected and excepted.)

"'The Commissioner of the General Land Office apparently expressly declining to decide the question whether the land selected was or was not of that character.'

"(To which last instruction so given the plaintiff at the time objected and excepted.)

"'Now, it is true that the surveyor general did not put these words in his approval. In the approval which he in fact made he said that it was subject to the provisions of the act of June 21st, 1860; and taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the approval.'

"(To which last statement of the court as given in his instructions to the jury the plaintiff at the time objected and excepted.)

"'So that I feel bound to say that the approval was with the condition that the plat should not embrace mineral lands, as directed by the Commissioner.'

"(To which statement of the court as given in his instructions to the jury the plaintiff at the time objected and excepted.)

"'And if this be the correct construction of the papers and documents and of the act of the surveyor general in making the approval, nothing thereafter done by the officers of the Land Department in the way of declaring what the force and effect of the

approval might be would at all change the character of the transaction, or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made.'

"(To which last statement of the court in his instructions to the jury the plaintiff at the time objected and excepted.)

"'There are several communications from the department to persons who were more or less interested in the tract or who assumed to have some interest in it, in which the Commissioner or some one connected with the department assume to say that the matter of the mineral character of the land was passed upon at the time of the approval of the survey. I cannot give to these communications any effect whatever.'

"(To which statement of the court so contained in his instructions to the jury the plaintiff at the time objected and excepted.)

"'We must assume that the Commissioner had no authority to thus construe the decision of his predecessor in office or
213 to give it any other effect than that which it appears to have from the letter of February 12th, 1864.'

"(To which instruction of the court the plaintiff at the time objected and excepted.)

"'Upon all this, gentlemen, I feel compelled to state to you, upon the principal matter embraced in the case, that the act of June 21st, 1860, and what was done under that act from time to time did not vest in the grantees of Luis Maria Baca and their successors in interest the mineral lands which may be within the tract located.'

"(To which instruction of the court so given to the jury the plaintiff at the time objected and *accepted*.)

"'This, of course, has no effect whatever upon such part of the tract, which seems to be far the greater part, as is not mineral, that which is pastoral and agricultural only and cannot be correctly described as mineral land, and it would doubtless pass under the grant without any question whatever such as is presented here.'

"'The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant and which he claims as a mine is embraced in the grant to the heirs of Luis Maria Baca, there is, of course, nothing left for you to do but to return a verdict upon the testimony for the defendant in the suit.'

"(To which last instruction and each part thereof so given to the jury the plaintiff at the time objected and excepted.)

"And thereupon, under the instruction of the court as aforesaid, the jury returned the verdict in favor of the defendant heretofore set out in the record.

"To which verdict and the returning of the same the plaintiff at the time objected and excepted."

7. The jury returned a verdict for the defendant pursuant to the instruction of the court, and judgment was accordingly entered against the plaintiff. A writ of error was duly sued out of this court to reverse that judgment, and the case is now pending in this court for hearing upon the assignments of error aforesaid.

And the said United States circuit court of appeals for the eighth

circuit further certifies that, to the end that it may properly decide the questions which arise in said case and which are presented by the assignments of error aforesaid, the said court desires the instruction of the Supreme Court of the United States upon the following questions and propositions of law:

First. Was the action of the Commissioner of the General Land Office or of the surveyor general of Colorado in 1863 and 1864, evidenced by the foregoing certificates and communications, a decision by the proper officer that none of the lands in said Baca Grant No. 4 were mineral lands, and a valid location upon the ground covered by said grant of the selection of that tract by the heirs of said Baca, under section six of the "act to confirm certain private
214 land claims in the Territory of New Mexico," approved June 21, 1860 (12 Stat., 72), or was the action of these officers a refusal to decide that question, and either an attempted or actual location of the selection of said heirs on that part only of the land described as Baca Grant No. 4 which should not at any time in the then future be found to be mineral land?

Second. Was the title to that portion of the lands described as Baca Grant No. 4, which is in controversy in this case and which was mineral land, but which was not known to be mineral land until 1876, vested in the heirs of Baca and their successors in interest by the said act of Congress and the action of the Commissioners of the General Land Office and of the surveyors general, evidenced by the foregoing certificates and communications?

Third. Was the direction of the circuit court to the jury to return a verdict for the defendant in this case right?

In witness whereof the undersigned, judges holding the said United States circuit court of appeals for the said eighth circuit, have hereunto set their hands this 30th day of March, A. D. 1896, at St. Louis, Missouri, and ordered and directed that the foregoing certificate be filed in said circuit court of appeals, and by the clerk of said court be duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL,
WALTER H. SANBORN,
AMOS M. THAYER,
Circuit Judges.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg, No. 664, December term, A. D. 1895, was duly filed and entered of record in my office by order of said court, and as directed by said court the said certificate is by me forwarded to the said Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribed my name and affix the seal of said circuit court of appeals, at the city of St. Louis, Missouri, this thirtieth day of March, A. D. 1896.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. 1895, December term. No. 664. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg. Certificate of questions to the Supreme Court of the United States. Filed Mar. 30, 1896. John D. Jordan, clerk.

Endorsed on cover: Case No. 16,252. U. S. circuit court of appeals, eighth circuit. Term No., 962. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg. Filed April 11, 1896.

215 (*Motion to Withdraw Original Exhibits.*)

And on the fifteenth day of December, A. D. 1896, a motion for leave to withdraw original exhibits was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

QUINCY A. SHAW, Plaintiff in Error,
vs.
MURRAY M. KELLOGG, Defendant in Error.

Motion to withdraw original exhibits.

The plaintiff in error, by Joel F. Vaile, as counsel, respectfully represents to the court that this court has heretofore of its motion certified the above-entitled cause to the Supreme Court of the United States upon certain questions by this court stated, which questions do not involve any consideration of the original exhibits filed with the record in this court; that the plaintiff has occasion to use said original exhibits in other litigation pending in the district of Colorado, and hereby respectfully moves the court that he have leave to withdraw said original exhibits, same being contained within a tin box heretofore deposited in the clerk's office of this court in connection with said cause.

JOEL V. VAILE,
Counsel for Plaintiff in Error.

Endorsed: 664. U. S. circuit court of appeals, 8th circuit. Quincy A. Shaw, pl'ff in error, *vs.* M. M. Kellogg, def't in error. Mo. to withdraw original exhibits. Filed Dec. 15, 1896. John D. Jordan, clerk. J. F. Vaile, for pl'ff in error.

(*Order: Leave to Withdraw Original Exhibits.*)

And on the fifteenth day of December, A. D. 1896, in the record of the proceedings of said circuit court of appeals is an order granting leave to withdraw original exhibits in the words and figures following:

216 United States Circuit Court of Appeals, Eighth Circuit, December Term, 1896.

TUESDAY, *December* 15, 1896.

QUINCY A. SHAW, Plaintiff in Error,
vs.
MURRAY M. KELLOGG, Defendant in Error. } No. 664.

In error to the circuit court of the United States for the district of Colorado.

On motion of Mr. Joel F. Vaile, counsel for the plaintiff in error, leave is granted said counsel to withdraw the original exhibits in this cause upon leaving with the clerk a receipt therefor conditioned that he will return same when so ordered by the court.

(*Receipt for Original Exhibits.*)

And on the fifteenth day of December, A. D. 1896, a receipt for said original exhibits was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

UNITED STATES OF AMERICA, }
Eighth Circuit. }

In the Court of Appeals.

QUINCY A. SHAW, Pl'ff in Error,
vs.
MURRAY M. KELLOGG, Def't in Error. } No. 664.

Received of John D. Jordan, clerk U. S. circuit court of appeals, all the original exhibits transmitted to this court with the transcript of the record on order of the circuit court of the district of Colorado, and we hereby stipulate that said original exhibits shall be promptly returned to the clerk of the court of appeals at any time upon order of the court or requirement of the said clerk to that effect

JOEL F. VAILE,
WOLCOTT & VAILE,
Att'ys for Pl'ff in Error.

12, 15, '96.

Endorsed: 664. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg. Receipt for original exhibits. Filed Dec. 15, 1896. John D. Jordan, clerk.

217 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing pages, numbered from 1 to —, inclusive, contain full, true, and complete copies of all the pleadings, proceedings, and record entries in a certain cause in said court, wherein Quincy A. Shaw was plaintiff in error and Murray M. Kellogg defendant in error, No. 664, as full, true, and complete as the originals of the same now remain on file and of record in my office.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said circuit court of appeals, at the city of St. Louis, Missouri, in the eighth circuit, this fifth day of January, A. D. 1898.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

218 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Quincy A. Shaw is plaintiff in error and Murray M. Kellogg is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Colorado, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States,
219 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Return to Writ.

United States Circuit Court of Appeals, Eighth Circuit.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, Missouri, this fifth day of January, A. D. 1898.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

219½ [Endorsed:] Case No. 16,252. Supreme Court of the United States. No. 154. October term, 1897. Quincy A. Shaw *vs.* Murray M. Kellogg. Writ of certiorari and return. Filed Dec. 30, 1897. John D. Jordan, clerk. Filed Jan. 8, 1898.

Endorsed on cover: Case No. 16,252. Sup. Court U. S., October term, 1897. Term No., 154. Quincy A. Shaw *vs.* Murray M. Kellogg. Writ of certiorari and return. Filed January 8, 1898.

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 962. 457 154.

QUINCY A. SHAW, PLAINTIFF IN ERROR,

vs.

MURRAY M. KELLOGG.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED APRIL 11, 1896.

(16,252.)

(16,252.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 962.

QUINCY A. SHAW, PLAINTIFF IN ERROR,

vs.

MURRAY M. KELLOGG.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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1 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1895.

QUINCY A. SHAW, Plaintiff in Error, *vs.* MURRAY M. KELLOGG, Defendant in Error.	No. 664. In Error to the Circuit Court of the United States for the District of Colorado.

The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Louis, Missouri, on this 30th day of March, A. D. 1896, hereby certifies that upon the record on file in said court in the case wherein Quincy A. Shaw is plaintiff in error and Murray M. Kellogg is defendant in error, and which cause is now pending before this court upon a writ of error duly sued out to review the judgment in favor of the defendant in error which was rendered by the United States circuit court for the district of Colorado, the following facts are made to appear:

1. Quincy A. Shaw, the plaintiff in error, brought an action of ejectment in the circuit court for the district of Colorado against Murray M. Kellogg for the possession and title to the following specifically described premises, situated within the outer boundaries of Baca grant No. 4, to wit: Section twenty-two (22), township one (1) north, — one (1) east, according to the plat of said Baca grant No. 4 as filed and recorded in the office of the county clerk and recorder of said Saguache county, in the State of Colorado, including in said section twenty-two certain mineral-bearing property designated by the defendant as the Eastern Star mine, and other mining
2 lands adjacent thereto within said section twenty-two.

2. The plaintiff alleged in his complaint that the amount in controversy was more than two thousand dollars; that he was the owner of Baca grant No. 4 and entitled to the possession of all thereof, including the said section twenty-two; that the defendant had entered upon and ousted him from the possession thereof and still unlawfully withheld the same; that the matter in dispute in this action arises under an act of Congress entitled "An act to confirm certain private land claims in the Territory of New Mexico," approved June 21, 1860; that the plaintiff claims that by virtue of said act and the finding of the surveyor general as to the non-mineral character of said land the title to the premises in dispute vested in the heirs of Luis Maria Baca and through them in the plaintiff, although subsequent discoveries of precious metals were made upon the lands here in controversy; while the defendant, on the other hand, claims that under the proper construction of said act of Congress and the finding of the surveyor general the subsequent discovery of precious metals upon the premises in controversy excluded the same from the grant made under said act.

3. The defendant answered. In his answer he denied that the plaintiff was the owner of the section twenty-two described in the complaint or of the mine situated thereon or any of the adjacent

mining property thereon, or that he was entitled to the possession thereof. He denied that the location of the lands in controversy under said act of Congress was ever approved by the proper officers of the Land Department of the United States, or that the surveyor general of Colorado was authorized to or did certify that the lands in dispute were non-mineral, and he alleged that at the time of their location they were known to be mineral lands.

He averred that on April 24, 1876, the land in dispute, where the Eastern Star mine is now located, was unappropriated public mineral land of the United States, and as such was subject to
3 exploration and location; that thereupon the grantors of the defendant discovered a vein of quartz bearing gold and silver thereon, and thereupon took possession thereof and duly located their mining claim thereon; that they and their successors in interest have performed annually from that time until said answer was filed the requisite labor and made the necessary improvements to entitle them to the possession and ownership of said mining claim and the premises in dispute under and pursuant to the mining laws of the United States.

The plaintiff filed a replication to this answer.

4. The case proceeded to trial before the court and a jury and the plaintiff introduced evidence in support of the allegations of his complaint and rested his case. When he closed his evidence the following facts stood admitted by the pleadings or had been proved by the evidence which he had introduced:

A. The land in controversy in this suit was worth more than two thousand dollars and was mineral land, but there was no proof that it was known to be such prior to A. D. 1876, and it was within the limits of Baca grant No. 4.

B. The act of Congress entitled "An act to confirm certain private land claims in the Territory of New Mexico," approved June 21, 1860 (12 Stat., 72), contained the following section:

"SEC. 6. And be it further enacted, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico, to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: Provided, however, That the right hereby
4 granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer."

C. Under this section the action indicated by the following communications and certificates was taken by the Commissioner of the General Land Office and the surveyors general of New Mexico and Colorado respectively:

"SURVEYOR GENERAL'S OFFICE, SANTA FÉ,
"NEW MEXICO, *December 8th*, 1860.

"Hon. Thomas Cabeza de Baca, legal representative of the heirs of Don Luis Maria Baca, dec'd.

"SIR: I hereby certify that the grant to the town of Las Vegas has been surveyed under instructions from this office and according to the laws of the United States, and that the acres of said tract of land *is* 496,446.96 acres.

"Under the act of Congress approved June 21st, 1860 (see Statutes at Large, page 71), the heirs of Luis Maria Baca are entitled to select, in not more than five square bodies, the amount of land equal to said area, upon any of the unoccupied lands, not mineral, of New Mexico, and the surveyor general is authorized to survey and locate the same. Therefore I notify you that this office is ready to co-operate with you and receive your application for the location of the lands granted by the Government.

"A. P. WILBAR,
"*Surveyor General of New Mexico.*"

"SURVEYOR GENERAL'S OFFICE, SANTA FÉ,
"NEW MEXICO, *December 8th*, 1860.

"SIR: Enclosed please find duplicate of the certificate in regard to the Las Vegas grant issued from this office to the legal representatives of the heirs of Luis Maria Baca.

"Yours very respectfully, A. P. WOLBAR,
"*Surveyor General.*

"Hon. Jos. S. Wilson, Com'r Gen'l Land Office."

"SURVEYOR GENERAL'S OFFICE,
"SANTA FÉ, *February 9th*, 1863.

"SIR: Please find enclosed herewith the application of the heirs of Luis Maria Baca to locate one-fifth of the private claim confirmed to them under the act of Congress approved June 21, 1860. The location falls within the Territory of Colorado, but within the limits of New Mexico as they existed at the date of the approval of the act confirming this claim.

"I have transmitted a copy of the enclosed to the surveyor general of Colorado to enable him when required to make the survey.

"I am, very respectfully, your ob't serv't,
"JOHN A. CLARK,
"*Surveyor General of New Mexico.*

"Hon. J. M. Edmunds, Com'r of General Land Office, Washington city, D. C."

"SURVEYOR GENERAL'S OFFICE,
"SANTA FÉ, NEW MEXICO, *February 5th*, 1863.

"I, John A. Clark, surveyor general of New Mexico, do hereby certify that on this day John S. Watts, Esq., in behalf of the heirs of Luis Maria Cabeza de Baca, filed in this office an application in the words and figures following, viz:

6 "'SANTA FÉ, NEW MEXICO, *December 12th*, 1862.

To Surveyor General John A. Clark, surveyor general of New Mexico:

I, John S. Watts, attorney of the heirs of Luis Maria Baca, have this day selected as one of the five locations belonging to the said heirs, under the 6th section of the act of Congress approved June 21st, 1860, a tract of land in the Territory of New Mexico described as follows:

Beginning at a point on the eastern edge of the valley of San Luis where the thirty-eighth parallel of north latitude crosses the base of the snowy range dividing the waters of the Rivers Arkansas and Del Norte, thence east along said parallel four and one-half miles, thence south along a meridian line twelve miles thirty-six chains and forty-four links' distance, thence west at a right angle twelve miles thirty-six chains and forty-four links' distance, thence north to the said specified parallel of latitude, thence east with said parallel to the place of beginning.

I further state that the said land is entirely vacant, not claimed by any one, is not mineral, but located for purposes of arable and pastoral agriculture, and is within the limits of the Territory of New Mexico as established in the organic act. I hereby accordingly make application for the survey and location of the tract of land in accordance with the provisions of the above act of Congress.

JOHN S. WATTS,
Attorney for Heirs of Luis Maria Baca.'

"And I further certify that the said tract of land, being the one-fifth part of the private claim confirmed to said heirs, contains ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre, and that this location is the fourth
7 of the series, and with the three locations heretofore made, numbered one, two, & three, includes four-fifths of the said private claim confirmed to the heirs of Luis Maria Cabeza de Baca by the act of Congress approved June 21, 1860.

"In witness whereof I have hereunto set my name this fifth day of February, A. D. 1863.

"JOHN A. CLARK,
"*Surveyor General of New Mexico.*"

"SURVEYOR GENERAL'S OFFICE,
"DENVER, Co. T'y, *Feb'y 24th*, 1863.

"Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C.

"SIR: I have the honor to report that I have this day received from the surveyor general of New Mexico a copy of the application of the att'y of the heirs of Luis Maria Baca for the location of one of the five locations belonging to said heirs under the act of June 21st, 1860, dated December 12th, 1862. The description of the tract selected is as follows: 'Beginning at a point (?) on the eastern edge of the valley of San Luis where the thirty-eighth parallel of north latitude crosses the base of the snowy range dividing the waters of

* * * the River-Arkansas and Del Norte, thence east along said parallel four and one-half miles, thence south along a meridian line twelve miles thirty-six chains and forty-four links' distance, thence west at a right angle twelve miles thirty-six chains and forty-four links' distance, thence north to the said specified parallel of latitude, thence east with said parallel to the place of beginning.'

"I suppose this selection has been made by ex-Gov. Gilpin, as he told me last summer he was in possession of one of the Baca 'floats' and should locate it as this is located for the reason that, in his opinion, it would cover rich minerals in the mountains.

8 "Very truly, yours ob't serv't,

"FRANCIS M. CASE,
"*Surv. Gen'l Colo. & Utah.*"

"GENERAL LAND OFFICE, *March 13th*, 1863.

"Surveyor general Colorado and Utah, Denver city, Colorado T'y.

"SIR: I am in receipt of your communication, dated the 24th of February last, reporting that you have received from the surveyor general of New Mexico a copy of the application of the attorney of the heirs of Luis Maria Baca for the location of one-fifth of the private claim confirmed to said heirs, the location being within the limits of New Mexico as they existed at the date of the confirmation, but falling within what is now the Territory of Colorado.

"It is necessary before the application can be approved by this office that it be accompanied by the certificates of the surveyor general and the register & receiver that the land selected is vacant and not mineral. This is in accordance with our instructions to the surveyor general of New Mexico, extracts from which were furnished your office in our communication of June 7th, 1862, especially should the character of the location as to minerals be carefully ascertained after the important statement of ex-Governor Gilpin which you communicated in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable you to do, you will transmit to this office your official certificate setting forth these facts.

"You will also correspond with the register and receiver of Colorado when they enter upon their official duties, communicating to them the substance of this communication, and call upon them to furnish their certificate, when able, under the same condi-

9 tions that your own is to be furnished under, which, when received, you will forward to this office.

"Very respectfully, your ob't serv't,

"JOS. S. WILSON,
"*Acting Commissioner.*"

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *Oct. 13th*, 1863.

"SIR: On the 3d day of October of the present year William Gilpin, as representative of the heirs of Luis Maria Baca, filed in

this office an application for the survey of grant No. 4 of the grants confirmed by the said heirs by act of Congress of June 21st, 1860, a copy of which application is herewith submitted.

"Mr. Gilpin further represented that he was desirous of taking immediate possession and improving the said grant, and that to do so it would be necessary to have the survey made during the next six weeks to avoid the deep snow which would render the survey impossible.

"I informed him that the instructions in this office forbid making the survey of any grant situated more than six miles from existing lines of public surveys, but as his grant was in a part of the country which it would probably be some time before the lines of survey would reach I would order the survey and make a contract subject to your approval. A copy of my reply to his application is herewith submitted.

"As there is yet no United States depository in operation in this country, Mr. Gilpin deposited the money with me and took my receipt for the same, a copy of which receipt is herewith enclosed. The money is in my hands subject to your order as to the disposition of it, but in case of the non-approval of the contract the money was to remain in my hands until the survey was finished and to be paid to the deputy for the work done, the survey being considered private and not official. This was done in order to secure myself and the deputy, as Mr. Gilpin wished the deputy to take the field immediately.

"I transmit herewith the copy of a contract made with Deputy Surveyor A. Z. Sheldon for the survey of the above-mentioned grant, and also my instructions to said deputy. I have acted in this matter as in my judgment seemed best under the circumstances, and hope it will meet your approval.

"Very respectfully, your ob't serv't,

"JOHN PIERCE,

"*Surveyor General of Colorado and Utah.*

"Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C."

"GENERAL LAND OFFICE, *November 2nd*, 1863.

"John Pierce, Esq., surveyor general, Denver, Col. Ter.

"SIR: In reply to your communication of the 12th ultimo covering contract—instructions and contract—with Deputy Surveyor A. Z. Sheldon for the survey of grant No. 4 of the Baca heirs, I have to say this office cannot approve said contract. In your letter dated the 10th March last, transmitting the application of the attorney of said heirs for the location of this claim, you say, 'I suppose this selection is being made by ex-Gov. Gilpin, as he told me last summer he was in possession of one of the Baca floats and should locate it as this is located, for the reason that in his opinion it would cover rich minerals in the mountains.'

"Upon receipt of your letter you were expressly informed, under date of the 13th March, 1860, that before the application could be

approved it must be accompanied by the certificates of the
11 surveyor general and the register and receiver that the land is vacant and not mineral, and I then took occasion to communicate the following explicit instructions: 'Especially should the character of the location as to minerals be carefully ascertained after the important statement of ex-Gov. Gilpin, which you communicate in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in the selection are vacant and not mineral, to enable you to do so, you will transmit to this office your official certificate setting forth these facts.'

"In our communication of the 7th June, 1862, you were also furnished with extracts from our instructions to the surveyor general of New Mexico, referring to the location of these claims, in which it was plainly indicated that should selections be made outside of the existing surveys, the survey thereof must be postponed until the vicinity is reached by the regular progress of the public surveys. You will be guided in your official acts by our instructions, which are full and explicit, in relation to the location of the claims referred to. The contract and instructions for the survey of the above-mentioned claim are herewith returned.

"Very respectfully, your ob't serv't,

"J. M. EDMUNDS,
"*Commissioner.*"

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *Dec. 12th*, 1863.

"SIR: I have the honor to acknowledge the receipt of your letter of the 2nd of Nov. last, disapproving of the contract for the survey of grant No. 4 of the floats belonging to the heirs of Luis Maria Baca.

"I herewith transmit my certificate that the lands are 'not mineral and are vacant.' You refer to a letter of the former
12 surv. gen'l of this district, in which he says that he supposes that this location was made by Mr. Gilpin, 'for the reason that, in his opinion, it would cover rich mineral lands.' I do not believe that at the time Mr. Case wrote that letter he had the least idea that the float as located covered any mineral lands. I have signed the accompanying certificate partly from my own knowledge of the country, but mostly from the following reasons:

"1st. The discoveries of gold thus far go to show that the gold lands of Colorado commence at the base of Long's peak and extend in a course about 30° west of south to the head-waters of the San Juan, covering a belt of country about 30 miles in width, of which the line indicated will be near the western boundary; outside of this no gold or silver lodes have been discovered.

"2nd. The grant is located on the great line of travel between Denver and Santa Fé, and thousands of experienced miners have been travelling *of* the Sangre de Christo and Mosca passes and have found no gold or other valuable minerals.

"3rd. In the summer of 1860 a party of one hundred and fifty

miners from here, under one Roeder, went to the San Luis valley and prospected the whole of the Sangre de Christo range, but found no gold anywhere on the eastern run of the park. Many of the men who were in this expedition have been in my employ, and from them I have had this history of the expedition.

"Such are the grounds on which I have signed the certificate, and to me they are satisfactory.

"The survey as made by Mr. Sheldon is probably as near perfect as can be made, as the mountains at the northeast corner of the grant are inaccessable at any time of the year.

"I have refunded to Mr. Gilpin the money placed in my hands, and he has paid for the survey as a private survey, though he has permitted me to make an abstract of the field-notes, which I have placed on file in this office.

13 "Your letter of November 16th, granting me a leave of absence, is also received. The cold weather has so protracted the surveys that I cannot avail myself of it, though it is possible that I may wish to visit the States some time during the winter or spring.

"Very truly, your ob't serv't, JOHN PIERCE,
"*Surv. Gen'l of Colorado & Utah.*

"Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C."

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *Dec. 5th*, 1863.

"SIR: This is to certify that from good and sufficient evidence I am perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their grant No. 4, in the San Luis valley, and marked out by a survey made by Albinus Z. Sheldon in November, 1863, is not mineral and is vacant.

"Very truly, your ob't serv't, JOHN PIERCE,
"*Surveyor General of Colorado and Utah.*"

"GENERAL LAND OFFICE, *January 16th*, 1864.

"John Pierce, Esq., surveyor general, Denver city, C. T.

"SIR: Your letter of the 14th Dec. last, with inclosed certificate relating to the 4th location of the Baca heirs, is received.

"The act of 21st of June, 1860, confirming the claim of Luis Maria Baca, authorized the heirs of said Baca to select in lieu
14 of the tract claimed by the town of Las Vegas an equal quantity of vacant land not mineral. With a view to carry out the requirements of the law, the surveyor general of Colorado was required in our instructions of June 7th, 1862, to accompany the final rendition of the certificate with his own statement, and also that of the register and receiver, setting forth the fact that the land selected is vacant and not mineral. Those instructions were reiterated in our letter of March 13th, 1863.

"The evidence furnished by you is not sufficient, in the opinion of this office, to prove that the selection No. 4 does not cover valuable mineral deposits. Your certificate is not based upon actual

knowledge of the facts, but upon the information and conclusions deduced from reasoning. This kind of proof is not deemed sufficient when large public interests may be involved, and the character of the location is made still more doubtful by the statement of ex-Governor Gilpin, officially communicated to this office by Surveyor General Case, that there are mineral lands in that locality.

"The statement of the register and receiver, required in our instructions, is also wanting.

"The approval of the selection will stand suspended until some satisfactory proof is obtained upon the points indicated.

"Very respectfully, your ob't serv't,

"J. M. EDMUNDS,
"*Commissioner.*"

"GENERAL LAND OFFICE, *February* 12, 1864.

"John Pierce, Esq., surveyor general, Denver city, Colo.

"SIR: I have considered your report of the 14th December
15 last respecting the survey made in November, 1863, by Deputy Surveyor Albinus Z. Sheldon, of what is known as the Luis Maria Baca float, in San Luis park, in Colorado, and containing 92,293 acres.

"You transmit your certificate 'that the lands are not mineral and are vacant,' and state under specific heads 'the grounds on which' you 'have signed the certificate' and which are satisfactory to you. You report further that 'the survey as made by Mr. Sheldon is probably as near perfect as can be made, as the mountains at the northeast corner of the grant are inaccessible at any time of the year.'

"The act of Congress approved 21st June, 1860, U. S. Statutes at Large, vol. 12, page 71, chap. 167, confers authority for the location of the said Baca float in the then Territory of New Mexico, but now a part of Colorado Territory.

"The said statute makes it the 'duty of the surveyor general of New Nexico,' now in your jurisdiction, 'to make survey and location of the lands so selected by the heirs of Baca when thereunto required by them,' with a proviso making a three years' limitation to the statute.

"You further report that you have refunded to Mr. Gilpin the money placed in your 'hands and he has paid for the survey as a private survey, though he has permitted' you 'to make an abstract of the field-notes which' you 'have placed on file in' the surveyor general's office.

"This part of the proceedings is irregular. Under statutory requirements it is obligatory upon private claimants to pay for the survey of confirmed private claims, but the work must be done under the usual obligations and responsibilities both of deputies & surveyor general.

"The difficulty, however, may be avoided by pursuing the following course: The original field-notes, duly verified and authen-

ticated, must be filed in the surveyor general's office of Colo-
16 rado upon bringing these to the usual satisfactory tests, and finding the same all regular and correct you are authorized in virtue of the aforesaid 6th section of the said act of 21st June, 1860, to approve the said survey, but in your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land nor to interfere with any other vested rights if such exist.

"The statute does not order the issue of a patent. The aforesaid law of 21st June, 1860, with your plat approved in the manner indicated, will therefore constitute the evidence of title.

"You will take care so to arrange the matter that hereafter when in the gradual progress of the lines of the public surveys they shall reach the Baca location they shall be properly connected therewith and so appear on the township plats.

"Very respectfully, your ob't serv't,

"J. M. EDMUNDS,
"*Commissioner.*"

"GENERAL LAND OFFICE, *Feb'y 26th*, 1864.

"John Pearce, Esq., surveyor general, Denver city, Colorado T.

"SIR: At the request of Wm. Gilpin, Esq., I herewith transmit the following papers, to wit:

"First. Mr. Gilpin's application for the survey of grant No. 4 of the heirs of Baca, dated Oct. 3rd, 1863.

"Second. Surveyor general's estimate of the cost of said survey, dated October 5th, 1863.

"Third. Surveyor general's receipt for $600, deposited by
17 Mr. Gilpin to pay for the above survey, October 6th, 1863.

"Fourth. Certificate of the register and receiver at Golden City, Colorado, that the lands covered by the said grant No. 4 are not mineral and are vacant, December 5th, 1863.

"Fifth. The field-notes of the boundary lines of the above grant, together with plat thereof.

"These papers were deposited in this office by Mr. Gilpin and are transmitted to you for such action as you shall deem proper in the premises, in accordance with the views expressed in our communication to you dated the 12th instant.

"Very respectfully, your obedient servant,

"J. N. EDMUNDS,
"*Commissioner.*"

"COLORADO TERRITORY, GOLDEN CITY, *Dec. 5th*, 1863.

"SIR: This is to certify that from good and sufficient evidence we are perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their grant, No. 4, in the San Luis valley, and marked out a survey made by Albinus Z. Sheldon in November, 1863, is not mineral and is vacant.

"G. N. CHILCOTT,
"*Register Land Office, Colo. Dist.*
"C. B. CLEMENTS,
"*Receiver Land Office, Colo. Ty.*"

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *March 29th*, 1864.

"SIR: I have the honor to acknowledge the receipt of your letter of Feb'y 26th, enclosing field-notes and papers in regard to the survey of grant No. 4 of the heirs of Luis Maria Baca.

"I herewith enclose transcript of field-notes & plat of said survey. I have furnished ex-Gov. Gilpin with one copy of the plat and retained one in the office.

18 "Very respectfully, your ob't serv't,

"JOHN PIERCE,
"*Surveyor General of Colorado & Utah.*"

The transcript of the field-notes referred to in the last letter contained the following and no other references to the mineral or non-mineral character of the lands contained in Baca grant No. 4, viz: "Saw no indications of the precious metals or minerals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle set forth in the notes," and it was accompanied with the following certificate:

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *March 15th*, 1864.

"The foregoing field-notes of the survey of grant No. 4, heirs of Luis Maria Baca, executed by Albinus Z. Sheldon, under his contract of the 7th day of October, 1863, having been critically examined, the necessary corrections and explanations made, the said field-notes and the survey they describe are hereby approved.

"JOHN PIERCE,
"*Surveyor General of Colorado and Utah.*"

The transcript of the survey referred to in the last letter had the following certificate indorsed thereon:

"The above map of the boundary lines of grant No. 4, of the heirs of Luis Maria Baca, in San Luis valley, Colorado Territory, as surveyed by Albinus Z. Sheldon, under his contract bearing date the 7th day of October, 1863, is strictly conformable to the field-notes on file in this office, which have been examined and approved, subject to the conditions and provisions of sec. 6 of the act of Congress approved June 21st, 1860.

"Surveyor general's office, Denver, March 18th, 1864.

"JOHN PIERCE,
"*Sur. Gen'l Colo. & Utah.*"

19 "GENERAL LAND OFFICE, *May 4th*, 1864.

"John Pierce, Esq., surveyor general, Denver city, C. T.

"SIR: Your letter of March 29th last, transmitting transcript & field-notes of the survey of grant No. 4, of the heirs of Luis Maria Baca, has been received at this office.

"Very respectfully, your ob't serv't,

"J. M. EDMUNDS,
"*Commissioner.*"

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *January* 14, 1868.

"Hon. J. S. Watts, present.

"SIR: Referring to your application of the 12th inst. for the issuing of patent for the tract of land in Colorado known as 'Baca tract No. 4.' I have to state that the selection authorized by the 6th section of the act of 21st June, 1860 (Stats., vol. 12, page 72), has been made, and the survey executed and reported to this office; but as no provision is made in the statute for the issuing of patent, the survey and statute are the only authorized evidences of title, this office having no authority to issue patents unless the statute expressly orders the same, which is not done in the Baca case; but 'that a grant may be made by a law as well as a patent pursuant to a law is undoubted (6 Cr., 128). A confirmation by a law is as fully, to all intents and purposes, a grant as if it contained in terms a grant *de novo*.' (12 Peters' Reports of the Decisions of the Supreme Court of the United States, page 454.)

"Very respectfully, your ob't serv't,

"JOS. S. WILSON,
"*Commissioner*."

20 "DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *March 21st*, 1879.

"Mr. Wm. L. Campbell, surveyor gen'l of Colorado.

"SIR: I have considered the application of Hon. Wm. Gilpin for a patent to the tract of land known as Baca claim No. 4, in Colorado.

"Section six of the act of Congress approved June 21, 1860, provided that the heirs of Luis Maria Baca might select a quantity of land equal to that claimed by the town of Las Vegas, to be located on vacant non-mineral land in New Mexico, in square bodies not to exceed five in number, the same when selected by the heirs to be surveyed and located by the surveyor general of New Mexico.

"It was subsequently ascertained that the quantity of land claimed by the town of Las Vegas, and therefore the amount to be selected by the Baca heirs, was 496,446.96 acres.

"In 1863 the Baca heirs selected the land now in question. This was the fourth tract, three having been previously selected, and therefore this tract was designated as Baca claim No. 4. It contains 99,289.39 acres, being one-fifth of the amount granted to said heirs.

"This was at the time of its selection in the Territory of Colorado; but at the date of the act making the grant, June 21, 1860, the tract was a part of the Territory of New Mexico.

"After the selection of this tract it was surveyed and located by the surveyor general of Colorado, he having first determined that the land was vacant and non-mineral.

"The seventeenth section of the act of Congress approved Feb. 28, 1861, gave the surveyor general of Colorado the same authority

concerning the location of this tract as was originally conferred on the surveyor general of New Mexico.

"After the selection, but previous to the location, the Com-
21 missioner of the General Land Office instructed the surveyor general of Colorado that as the statute did not authorize the issuing of a patent, the act of June 21, 1860, and the plat approved by the surveyor general would constitute the evidence of title.

"There is no doubt that Government may convey and vest the legal title without issuing a patent as effectually as may be done by a patent. Larriviere *v.* Madegan, 1 Dillon, 455; Gregnon *v.* Aster, 2 Howard, 319; 3 Opinions of Att'y Gen., 350.

"The surveyor general was authorized by the act to locate only vacant non-mineral land. Unless the contrary appeared, it would be presumed from the act of locating that the surveyor general determined the land was not mineral.

"It is now alleged that the land is mineral; that the surveyor general approved the plat of survey 'subject to the conditions and provisions of section six of the act of Congress approved June 21, 1860,' and that, therefore, the grantees cannot hold the land under that act.

"The conditions and provisions of the act of June 21, 1860, were, as respects this question, that the selection and location should be on land determined at the time of such location, when the title passed, to be non-mineral land.

"The act did not intend that if, at any subsequent time in the remote future, mineral should be discovered the title should be unsettled or that the title should be the subject of controversy through all time, as often as any one might choose to allege its mineral character.

"The surveyor general did not undertake and had no power to impose conditions not in the act.

"If, after fifteen years, the question as to the mineral character of the land may be reopened, why may it not be raised again after the lapse of any number of years? If the question may be reopened as to the land granted under the provisions of the act of June 21,
1860, why may it not as to land acquired under the home-
22 stead, pre-emption, and other acts of Congress? Would such titles ever be considered secure?

"The question as to the mineral or non-mineral character of this land has been passed upon by competent authority. The title has passed from the Government and vested in private individuals. This office has no authority to reopen the question. The land cannot longer be regarded as a part of the public domain.

"Mr. Gilpin, who claims this tract of land as the assignee of the Baca heirs, makes personal application for a patent. It is not claimed that the granting act authorized a patent to issue, but that it is authorized by section two of the act approved March 3, 1869 (15 Stat., 342), and by sec. 2447, Rev. Stat. U. S.; but those provisions authorize patent to issue only when claims to land have been confirmed by law—that is, where an act of Congress recognizes a claim to specific land—and does not apply to cases where the

acts of Congress only authorize a claim to be made thereafter to land without regard to any specific tract or parcel of land. This office can issue patents only where it is authorized by some act of Congress. The application of Mr. Gilpin for a patent must therefore be refused.

"Very respectfully, J. A. WILLIAMSON,
"*Commissioner.*"

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *June 28th*, 1884.

"W. Niel Dennison, Esq., Cañon City, Colorado.

"SIR: I have received, by reference from the department, your letter of June 12th inst., addressed to the Hon. Secretary of the Interior, relating to the Baca location No. 4 ("Gilpin grant"), in which you inquire, 1st, if said grant is located on mineral or non-mineral land, and, 2nd, if prospectors will be allowed to
23 hold any mineral discoveries made on said No. 4 prior to the year 1880.

"In reply to said inquiries I have to say that by the 6th section of the act of June 21, 1860 (12 Stat., 71), the heirs of Baca were authorized to select the quantity of land awarded to them, in not more than five square bodies, upon vacant non-mineral land, and it was made the duty of surveyor general to make survey and location of the land selected, of course subject to the conditions imposed as to the character of the land awarded.

"In the case of location No. 4, in question, the surveyor general, having first ascertained and determined that the land selected was vacant and non-mineral, surveyed and located it, and approved the plat of the location March 18, 1864, and this approved plat, in the absence of any provision of law for the issuing of patent, became the evidence of title in the owner of the land so located.

"On a subsequent application by Gov. Gilpin for a patent it was contended before this office that mineral existed in some part of the location, and therefore the grantee could not hold the land under the act. The matter was fully considered and the following conclusion reached:

"'The conditions and provisions of the act of June 21, 1860, were, as respects this question, that the selection and location should be on land determined at the time of such location when the title passed and to be non-mineral.

"'The act did not intend that, if at any subsequent time in the remote future, mineral should be discovered the title should be unsettled, or that the title should be the subject of controversy through all time, as often as one might choose to allege its mineral character.

"'The surveyor general did not undertake and had no power to impose conditions not in the act.

"'The question as to the mineral or non-mineral character of the land has been passed upon by competent authority; the title has

passed from the Government and vested in private individ-
24 uals, and this office has no authority to reopen the question: the land can no longer be regarded as a part of the public domain.'

"You will see by the foregoing that the land in question was determined in 1864 by the surveyor general, whose province and duty it was, to be non-mineral; the location was then perfected and the title passed. Whether prospectors will be allowed to hold any mineral discoveries thereon prior to or since 1880 must probably rest between them and the holders of the location No. 4.

"Respectfully, N. C. McFARLAND,
"*Commissioner.*"

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *June* 8, 1889.

"Jno. Duncan & Co., Westcliffe, Colo.

"GENTLEMEN: I am in receipt, by reference, of your letter dated the 18th ult., addressed to the Hon. Secretary of the Interior, in regard to mines and minerals within the surveyed limits of 'Baca claim No. 4,' commonly known as the 'Gilpin grant.'

"In reply I have to say that by the 6th section of the act of Congress approved June 21, 1860, the Baca heirs were permitted to select a quantity of land equal to that claimed by the town of Las Vegas to be located on vacant non-mineral land in New Mexico, in square bodies, not to exceed five in number, the same, when selected by the heirs, to be located and surveyed by the surveyor general of New Mexico.

"It was subsequently determined that each of said tracts should contain 99,289.39 acres, the one-fifth part of the area claimed by the town of Las Vegas.

"In the year 1863 said heirs selected the tract in question, three other tracts having been previously selected.

25 "At the time of its selection this tract was in Colorado, but at the date of the act (June 21, 1860) the tract was in the Territory of New Mexico.

"Thereafter Mr. Gilpin, who claimed the land as the assignee of the Baca heirs, applied for a patent, which was denied him for the reason that there was no provision of law for the issuance of patents on these locations.

"Mr. Gilpin was, however, given an approved plat of the official survey of this tract number 4, as evidence of title, in connection with the acts of Congress aforesaid and his purchase from the heirs.

"In determining the various questions involved in the case this office on March 21, 1879, decided that the character of the land involved had already been determined and the matter, therefore, was *res adjudicata*.

"'The question as to the mineral or non-mineral character of this land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals.

This office has no authority to reopen the question. The land can no longer be regarded as a part of the public domain,' &c.

"The case has, therefore, become final so far as this office is concerned, and unless authorized to do so by some superior authority I cannot recognize entries or filings as established by the approved survey thereof.

"Very respectfully,

W. M. STONE,
"*Acting Commissioner.*"

5. The plaintiff has through various mesne conveyances succeeded to the rigl ts of the heirs of Luis Maria Baca to the lands covered by Baca grant No. 4, which include those in controversy in this suit.

6. Upon this state of facts, at the close of the evidence for the plaintiff, the circuit court instructed the jury as follows, and the plaintiff in error excepted to the various portions of the *of*
26 *the* charge as noted below and has in this court duly assigned those parts of the charge duly excepted to as error, and has also duly assigned the court's instruction to the jury to return a verdict against him as error:

"HALLETT, *J.*, (orally):

"This action, gentlemen of the jury, is to recover a small plat of land in what is known as the Baca grant No. 4, in the San Luis valley. I think it is the county of Saguache, but I am not sure whether the county is given in the complaint.

"The plaintiff relies upon an act of Congress passed June 21st, 1860, by which the heirs of Luis Baca were permitted to locate this tract of land. You have heard the testimony at great length as to the way in which the location was made and surveyed and all the proceedings in the Land Office in respect to it. Objection is made that the location was not within the time limited by the act of Congress, which was three years, and that is put upon the ground that there was no sufficient description of the tract located to make it known to the public at large where the location would be, and upon the ground that the initial point from which the survey of the tract would be extended was not a fixed and determined point. That was declared in the paper filed with the surveyor general of New Mexico to be the point where the 38th parallel of latitude crosses the base of the snowy range which divides the waters of the Arkansas and Del Norte rivers at the eastern edge of the San Luis valley. It is said that this is not sufficient to fix the location, and there should have been some monument or some natural object open to the view of all people from which the lines should be run. Upon that I do not care to enter at length. I shall assume that the testimony which has been delivered before you is sufficient to enable you to determine this point, and that you would determine it under the testimony to have been properly fixed. If the location was so designated as to be understood by the public at large, I am of the opinion that the
27 circumstance that no survey of the location was made within the three years following the passage of the act is not material.

A survey was in fact made in the latter part of the year 1863 and about six months after the expiration of the three years mentioned in the act. I assume also that the survey made by Mr. Sheldon was sufficient in form. The lines were not closed at the northeast corner. There were three or four miles of the north line and perhaps a greater length of the east line which were not laid at that time because of the difficulty of traversing the mountains. The surveyor states in his notes that he found it impossible at the season of the year in which he was carrying on the work to proceed over the mountains, and so the lines were not laid at the time. This survey having been accepted by the officers of the Land Department and approved by them, it cannot be alleged that it was not in form sufficient or that there was any defect in it from the circumstance that a portion of the lines were omitted from the survey at the time when it was made.

"Upon that we come to another question, which is the most important in the whole case, and that is whether mineral lands passed by the terms of the act and what was done under it to the grantees therein. The act itself declares that the location of the tract shall be upon lands vacant and not mineral. The grantees, the heirs of Baca, were not at liberty to select mineral land. The complaint describes the land of which the defendant is said to be in possession and which he wrongfully withholds from the plaintiff as mineral land, so that you have no question to consider whether the lands were or were not of that character. The plaintiff having averred that they have the character of mineral lands, there is no issue upon that point, so that the question presented and simply stated is whether mineral lands passed under the grant of the act of June 21st, 1860, and, as I have said, the grantees under that act,
28 the heirs of Baca, were required to select lands which were not mineral. In any selection which they could make they could not determine the quality of the lands in that respect—that is to say, they could not determine in a manner which would be conclusive upon the Government and upon subsequent claimants under the Government whether the lands were or were not mineral. In order to make a valid determination of that matter there must be some participation by the Government in the selection—that is to say, the Government must investigate and pass upon the question whether the lands selected were or were not mineral.

"And so we come to the question whether anything was done by the Government in that direction at any time whatsoever or up to the time of the approval of the survey of the lands. It is contended for the plaintiff that the act itself and the selection of the lands under it make a good title in the grantees named in the act, and it may be true that no other evidence of title was required. I have not looked into that question particularly whether there was authority in the Government to issue a patent for the land or not. It is said, and it seems to be established by the various communications from the Land Department and the officers of that department, that they constantly maintain that there was no authority in the Government to issue a patent for the land, and therefore they

have declined to issue it. Upon all such occasions the officers of that department declared that the act of Congress and the survey with the plat of the land constituted the title of the grantees under the act. No further communication and no other document or paper could be issued by the Government in confirmation of the title of the grantees. However that may be, if it appeared that the officers of the Land Department in Washington had at any time passed upon the question of the conclusiveness of the grant and had declared in terms that the land was not mineral, or to that effect, it might be said that the grantees took the land as not being mineral, and, whatever its character, that the question was properly decided by the Government and binding upon all who might subsequently make claim to it.

29 "It seems upon examination of the testimony which has been offered to you that no such determination was made. The communication upon which the surveyor general of the Territory of Colorado approved the plat and the notes of survey expressly required in making such approval that it should be declared that the lands within the tract were not regarded as mineral. The instruction of the Commissioner of the General Land Office, as found in a letter to the surveyor general of Colorado of date February 12th, 1864, is that he will be authorized to approve the plat upon finding it to be correct in the usual way, and the Commissioner adds: 'In your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land nor to interfere with any other vested rights, if such exist'—that is to say, the surveyor general of Colorado was authorized to approve the plat in so far as it did not embrace mineral land, the Commissioner of the General Land Office apparently expressly declining to decide the question whether the land selected was or was not of that character.

"Now, it is true that the surveyor general did not put these words in his approval. In the approval which he in fact made he said that it was subject to the provisions of the act of June 21st, 1860, and, taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the approval, so that I feel bound to say that the approval was with the condition that the plat should not embrace mineral lands, as directed by the Commissioner, and if this be the correct construction of the papers and documents and of the act of the surveyor general in making the approval, nothing thereafter done by the officers of the Land Department in the way of declaring what the force and effect of the approval might be would at all change the character of the transaction or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made.

30 "There are several communications from the department to persons who were more or less interested in the tract, or who assume to have some interest in it, in which the Commissioner or some one connected with the department assume to say that the

matter of the mineral character of the land was passed upon at the time of the approval of the survey. I cannot give to these communications any effect whatever. We must assume that the Commissioner had no authority to thus construe the decision of his predecessor in office or to give it any other effect than that which it appears to have from the letter of February 12th, 1864.

"Upon all this, gentlemen, I feel compelled to state to you, upon the principal matter embraced in this case, that the act of June 21st, 1860, and what was done under that act from time to time did not vest in the grantees of Luis Maria Baca and their successors in interest the mineral lands which may be within the tract located. This, of course, has no effect whatever upon such part of the tract, which seems to be by far the greater part, as is not mineral. That which is pastoral and agricultural only cannot be correctly described as mineral land, and it would doubtless pass under the grant without any question whatever such as is presented to us here.

"The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant and which he claims is a mine is embraced in the grant to the heirs of Luis Maria Baca, there is, of course, nothing left for you to do but to return a verdict upon the testimony for the defendant in the suit.

"And thereupon the plaintiff, by his counsel, objected and excepted to certain portions of the instructions so given by the court as hereinafter specifically set forth.

"'The court instructed the jury, among other things, as follows:

"'I think that if it appeared that the officers of the Land Department in Washington had at any time passed upon the ques-
31 tion of the conclusiveness of the grant and had declared in terms that the land was not mineral, or to that effect, it might be said that the grantees took the land as not being mineral, and, whatever its character, that the question was properly decided by the Government and binding upon all who might subsequently make claim to it. It seems upon examination of the testimony which has been offered to you that no such determination was made.'

"(To which last statement of the court so given in his instructions to the jury the plaintiff at the time objected and excepted.)

"'The communication upon which the surveyor general of the Territory of Colorado approved the plat and the notes of survey expressly required in making such approval that it should be declared that the lands within the tract were not regarded as mineral.'

"(To which instruction of the court the plaintiff at the time objected and excepted.)

"'The instruction of the Commissioner of the General Land Office, as found in a letter to the surveyor general of Colorado of date February 12th, 1864, is that he will be authorized to approve the plat, upon finding it to be correct, in the usual way. And the Commissioner adds: "In your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace

mineral land, nor to interfere with any other vested rights, if such exist." That is to say, the surveyor general of Colorado was authorized to approve the plat in so far as it did not embrace mineral land.'

"(To which last statement of the court so given in his instructions to the jury the plaintiff at the time objected and excepted.)

"'The Commissioner of the General Land Office apparently expressly declining to decide the question whether the land selected was or was not of that character.'

"(To which last instruction so given the plaintiff at the time objected and excepted.)

32 "'Now, it is true that the surveyor general did not put these words in his approval. In the approval which he in fact made he said that it was subject to the provisions of the act of June 21st, 1860, and, taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the approval.'

"(To which last statement of the court as given in his instructions to the jury the plaintiff at the time objected and excepted.)

"'So that I feel bound to say that the approval was with the condition that the plat should not embrace mineral lands, as directed by the Commissioner.'

"(To which statement of the court as given in his instructions to the jury the plaintiff at the time objected and excepted.)

"'And if this be the correct construction of the papers and documents and of the act of the surveyor general in making the approval, nothing thereafter done by the officers of the Land Department in the way of declaring what the force and effect of the approval might be would at all change the character of the transaction or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made.'

"(To which last statement of the court in his instructions to the jury the plaintiff at the time objected and excepted.)

"'There are several communications from the department to persons who were more or less interested in the tract or who assumed to have some interest in it, in which the Commissioner or some one connected with the department assume to say that the matter of the mineral character of the land was passed upon at the time of the approval of the survey. I cannot give to these communications any effect whatever.'

"(To which statement of the court so contained in his instructions to the jury the plaintiff at the time objected and excepted.)

"'We must assume that the Commissioner had no author-
33 ity to thus construe the decision of his predecessor in office

or to give it any other effect than that which it appears to have from the letter of February 12th, 1864.'

"(To which instruction of the court the plaintiff at the time objected and excepted.)

"'Upon all this, gentlemen, I feel compelled to state to you, upon the principal matter embraced in the case, that the act of June 21st, 1860, and what was done under that act from time to time did not vest in the grantees of Luis Maria Baca and their successors in interest the mineral lands which may be within the tract located.'

"(To which instruction of the court so given to the jury the plaintiff at the time objected and *accepted*.)

"'This, of course, has no effect whatever upon such part of the tract, which seems to be far the greater part, as is not mineral, that which is pastoral and agricultural only and cannot be correctly described as mineral land, and it would doubtless pass under the grant without any question whatever such as is presented here.

"'The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant and which he claims as a mine is embraced in the grant to the heirs of Luis Maria Baca, there is, of course, nothing left for you to do but to return a verdict upon the testimony for the defendant in the suit.'

"(To which last instruction and each part thereof so given to the jury the plaintiff at the time objected and excepted.)

"And thereupon, under the instruction of the court as aforesaid, the jury returned the verdict in favor of the defendant heretofore set out in the record.

"To which verdict and the returning of the same the plaintiff at the time objected and excepted."

7. The jury returned a verdict for the defendant pursuant to the instruction of the court, and judgment was accordingly en-
34 tered against the plaintiff. A writ of error was duly sued out of this court to reverse that judgment, and the case is now pending in this court for hearing upon the assignments of error aforesaid.

And the said United States circuit court of appeals for the eighth circuit further certifies that, to the end that it may properly decide the questions which arise in said case and which are presented by the assignments of error aforesaid, the said court desires the instruction of the Supreme Court of the United States upon the following questions and propositions of law:

First. Was the action of the Commissioner of the General Land Office or of the surveyor general of Colorado in 1863 and 1864, evidenced by the foregoing certificates and communications, a decision by the proper officer that none of the lands in said Baca grant No. 4 were mineral lands, and a valid location upon the ground covered by said grant of the selection of that tract by the heirs of said Baca, under section six of the "Act to confirm certain private land claims

in the Territory of New Mexico," approved June 21, 1860 (12 Stat., 72), or was the action of these officers a refusal to decide that question, and either an attempted or actual location of the selection of said heirs on that part only of the land described as Baca grant No. 4 which should not at any time in the then future be found to be mineral land?

Second. Was the title to that portion of the lands described as Baca grant No. 4, which is in controversy in this case and which was mineral land, but which was not known to be mineral land until 1876, vested in the heirs of Baca and their successors in interest by the said act of Congress and the action of the Commissioners of the General Land Office and of the surveyors general, evidenced by the foregoing certificates and communications?

Third. Was the direction of the circuit court to the jury to return a verdict for the defendant in this case right?

35 In witness whereof the undersigned, judges holding the said United States court of appeals for the said eighth circuit, have hereunto set their hands this 30th day of March, A. D. 1896, at St. Louis, Missouri, and ordered and directed that the foregoing certificate be filed in said circuit court of appeals, and by the clerk of said court be duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL,
WALTER H. SANBORN,
AMOS M. THAYER,
Circuit Judges.

36 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg, No. 664, December term, A. D. 1895, was duly filed and entered of record in my office by order of said court, and as directed by said court the said certificate is by me forwarded to the said Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said circuit court of appeals, at the city of St. Louis, Missouri, this thirtieth day of March, A. D. 1896.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] U. S. circuit court of appeals, eighth circuit. 1895, December term. No. 664. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg. Certificate of questions to the Supreme Court of the United States. Filed Mar. 30, 1896. John D. Jordan, clerk.

Endorsed on cover: Case No. 16,252. U. S. circuit court of appeals, eighth circuit. Term No., 962. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg. Filed April 11, 1896.

No. 962. 489
Motion Papers for P. C.
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[illegible]

Filed April 27, 1896.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 962.

QUINCY A. SHAW, PLAINTIFF IN ERROR,

vs.

MURRAY M. KELLOGG.

APPLICATION OF PLAINTIFF IN ERROR FOR CERTIFICATION OF ENTIRE RECORD UNDER CLAUSE II OF RULE 37.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
Attorneys for Plaintiff in Error.

(16,252.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 962.

QUINCY A. SHAW, PLAINTIFF IN ERROR,

vs.

MURRAY M. KELLOGG, DEFENDANT IN ERROR.

APPLICATION FOR CERTIFICATION OF ENTIRE RECORD UNDER CLAUSE II OF RULE 37.

The plaintiff in error respectfully represents unto the Court that this cause has been brought to this Court from the United States circuit court of appeals for the eighth circuit upon a statement and certain questions certified to this Court by the said circuit court of appeals, under the provisions of section VI of the act of March 3, 1891, for the instructions of this Court upon the questions so submitted.

And the plaintiff in error respectfully represents unto the Court that it is important in the consideration of said cause and the determination thereof that this Court should have before it the entire record therein; that the said cause was originally determined in the trial court by a direction for a verdict at the conclusion of the plaintiff's evidence; that

in order to fully and fairly present the merits of the controversy it is necessary for this Court to inspect certain evidence, documentary and otherwise, contained in the record of said cause, which is not fully set forth in the statement certified to this Court by the said court of appeals.

The plaintiff in error further represents unto the Court that the main question involved in said cause is as to whether the heirs of Luis Maria Baca, grantees of the United States under the act of Congress of June 21, 1860, entitled "An act to confirm certain private land claims in the Territory of New Mexico," upon the confirmation to them of Baca grant No. 4 obtained the title to such portion of said lands, not then known to be mineral, as were in subsequent years ascertained to contain mineral.

That the proper determination of said question involves a consideration of the acts of the General Land Office of the United States in the location, survey, approval of survey and location, and subsequent recognition of the title of the heirs of Luis Maria Baca to said lands.

The plaintiff in error respectfully represents that the evidence as to the passage of said title rests in various letters and documents emanating from the General Land Office, as well as in the act of Congress of July 21, 1860, hereinabove mentioned; that some of the said letters and documents are included in the statements made by the United States circuit court of appeals for the eighth circuit to accompany the questions by that court certified to this Court for instructions; that various other letters, documents, and matters of testimony appear in the full record of said cause which are not included in the statements so made by the said circuit court of appeals, but which, plaintiff in error respectfully submits, are important to the full consideration of the questions presented.

The plaintiff respectfully represents unto the Court that no patent was ever issued for the lands in controversy for the reason, as assigned by the General Land Office, that the

act of June 21, 1860, did not provide for a patent: that there was no general law providing for the issuance of patents in cases such as this, and that the act of Congress aforesaid, in connection with the approved survey, fully conveyed the title to the grantees named in the act of Congress.

And plaintiff in error respectfully represents unto the Court that in construing the terms of the approval of the survey of said lands by the General Land Office and in determining whether the General Land Office intended that such approval should be final and complete as to all lands not then known to be mineral the following evidence, appearing in the complete Record and not certified to this Court by the circuit court of appeals aforesaid, should be considered by this Court, to wit:

(1.) The field-notes of the original survey of said Baca grant No. 4, and especially the general description of the said lands and as to the mineral or non-mineral character of the same contained in said field-notes, which said field-notes are set out in full as Exhibit No. 6, appearing at pages 46 to 61 of the certified copy of the complete Record herewith submitted, and which field-notes were duly approved by the surveyor general of Colorado and Utah on the 15th day of March, 1864.

(2.) A certain letter of instructions, issued by the General Land Office under date of July 26, 1860, as to the method of carrying out the provisions of the act of July 21, 1860, which said letter appears at page 33 of the complete Record.

(3.) Extracts from the report of the Secretary of the Interior transmitted by the President with his annual message to Congress under date of December 5, 1864, being a portion of Executive Document No. 1 of the House of Representatives, Thirty-eighth Congress, second session, and being,

to wit, Exhibit No. 21, appearing on pages 104 and 105 of the certified copy of the Record, reporting the survey and approval thereof of Baca grant No. 4 and giving the acreage thereof.

(4.) Extract from the report of the surveyor general of the State of Colorado, included in the annual report of the Secretary of the Interior aforesaid, the same being set forth as Exhibit No. 22, at page 105 of the certified copy of the complete Record.

(5.) A certain original exhibit, being a map accompanying the report of the Secretary of the Interior for the year 1864, showing Baca grant No. 4 as segregated from the public domain, set forth at page 105 of the printed Record.

(6.) A like map showing Baca grant No. 4 as segregated from the public domain, issued by authority of the General Land Office, of date October 2, 1866, the same being original Exhibit No. 23, accompanying the original complete Record.

(7.) Exhibit No. 24, being an extract from the report of the Commissioner of the General Land Office for the year 1866, recognizing that the title to Baca float No. 4 had passed from the Government to private individuals.

(8.) Exhibit No. 25, as shown at page 107 of the printed Record, being a map issued November 5, 1868, under the authority of the General Land Office, showing Baca grant No. 4 segregated from the public domain.

(9.) Exhibit No. 28, showing a list of private claims and including said Baca grant No. 4, set forth in the official report of the Commissioner of the General Land Office, bearing date in 1869, and appearing in full at pages 111 to 113 of the certified copy of the complete Record.

The plaintiff in error further respectfully represents unto the Court that in the oral evidence submitted in said cause in the trial court and as shown by the complete Record it is made to appear that the plaintiff in error and his grantors have been in the actual and continuous possession of said Baca grant No. 4 for more than thirty years, and for more than twenty-five years have been using the same for agricultural and pastoral purposes; that three-fourths of the body of land comprising said grant (which, by law, was required to be taken in a square form) consists of level grazing and agricultural lands in the valley of the San Luis, and that the northeast corner thereof extends into the Sangre de Cristo mountains, where is found the only timber upon the granted premises, and in which are also found the headwaters of the streams upon which the plaintiff in error and his grantors have relied for the irrigation of the agricultural lands below.

That it also appears from the evidence submitted in said cause, as will appear from an inspection of the complete Record, that the said entire grant of nearly one hundred thousand acres has been for more than fifteen years under fence, said fence extending from the precipitous mountains on the north line, about two miles and a half west of the northeast corner, thence westerly nine miles and a half to the northwest corner, thence southerly twelve miles to the southwest corner, thence easterly twelve miles to the southeast corner, and thence northerly a little more than four miles to the precipitous mountains which mark the northeast corner of the grant, and that by means of said fence, together with the mountains on the northeast corner, the whole of said grant has since the year 1881 been enclosed by the plaintiff in error and his grantors, as is fully set forth in the evidence of George H. Adams, appearing on page 93 of the certified copy of the Record.

That it further appears from the evidence contained in said complete Record that the plaintiff in error and his

grantors have not only been in possession of said premises, as hereinabove mentioned, but have been continuously paying State and county taxes thereon and on the whole thereof, and that such taxes from the year 1877 down to the time of the trial of this cause so paid by the plaintiff in error and his grantors amounted to more than sixty-six thousand dollars, said taxes being paid upon the whole of said grant, including the particular portion thereof in controversy in this suit. The evidence concerning the payment of said taxes appears at page 102 of the certified copy of the Record.

And the plaintiff in error respectfully represents unto the Court that the various matters herein mentioned are important and should be considered by this Court in connection with the other matters set forth in the statement heretofore certified to this Court by the circuit court of appeals for the eighth circuit.

Wherefore the plaintiff in error, pursuant to the second paragraph of the 37th rule of this Court, respectfully makes application to this Court that the whole record and cause may be sent up to it for its consideration; and the said plaintiff in error herewith submits a certified copy of said entire record, in compliance with the provisions of said rule 37.

Respectfully submitted.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
Attorneys for Plaintiff in Error.

UNITED STATES OF AMERICA:

IN THE SUPREME COURT, OCTOBER TERM, A. D. 1895.

QUINCY A. SHAW, *Plaintiff in Error,*
vs.
MURRAY M. KELLOGG, *Defendant in Error.* } No. 962.

Notice.

To the above-named defendant in error, Murray M. Kellogg, and to John R. Smith, Esq., his attorney.

GENTLEMEN: You will please take notice that in the above-entitled cause the plaintiff in error will, on Monday, April 27, 1896, apply to the Supreme Court of the United States for an order for the certification to that Court from the circuit court of appeals of the eighth circuit of the whole record in said cause, pursuant to the second paragraph of rule 37 of the Supreme Court of the United States.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
Attorneys for Quincy A. Shaw, Plaintiff in Error.

Service of the foregoing notice is hereby acknowledged on behalf of the defendant in error this 17th day of April, 1896.

JOHN R. SMITH,
Attorney for Murray M. Kellogg, Defendant in Error, 415 Charles Bld'g, Denver, Colorado.

No. 154.

Stipulation as to Exhibits.

Filed Feb. 23, 1898.

In the Supreme Court of the United States

OCTOBER TERM, 1897.

No. 154.

QUINCY A. SHAW, PLAINTIFF IN ERROR,

vs.

MURRAY M. KELLOGG, DEFENDANT IN ERROR.

STIPULATION.

It is hereby stipulated by and between the parties to the above-entitled cause that the following original exhibits, transmitted by plaintiff in error to the clerk of the Supreme Court of the United States, to wit—

No. 15. Photograph of Crestone mountains, at the initial corner of Baca grant No. 4;

No. 16. Photograph of Crestone mountains, adjacent to grant;

No. 25. Transcript of part of official map of Colorado for the year 1868;

No. 29. Plat prepared by Prof. P. H. Van Diest, showing lands adjacent to initial corner;

No. 34. Plat of "Completion survey" of N. E. corner of Baca grant No. 4;

No. 35. Manual of instructions to surveyors general, of date February 2, 1855;

No. 40. Hayden's geological and topographical map for part of Colorado;

No. 41. Official map of Colorado for the year 1892—

are the original exhibits, of corresponding numbers, used upon the trial of said cause in the circuit court for the district of Colorado, and are the exhibits described on page 150 of the printed record on file in this court, and that the same may be considered by the court as if directly certified by the clerk of the United States circuit court of appeals for the 8th circuit.

It is hereby further stipulated and agreed that the following original exhibits, designated at page 150 of said printed record, are not necessary for the consideration of the issues now submitted to the Supreme Court of the United States, and that the said cause may be heard and determined without the use of said exhibits, to wit:

No. 22½. Official map of the United States, accompanying the report of the Secretary of the Interior for the year 1864.

No. 23. Official map of Colorado for the year 1866.

No. 36. Card-board model, and parts thereof, showing profiles of mountains near initial corner.

No. 37. Plat of profiles, on natural and exaggerated scale, prepared by Mr. Duval.

No. 38. Plat of profiles, on exaggerated scale, prepared by Mr. Duval.

No. 39. Map of Baca grant No. 4, showing mountains at N. E. corner, as determined by the witness Darby.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
Attorneys for Plaintiff in Error.
JOHN R. SMITH,
Attorney for Defendant in Error.

[Endorsed:] Case No. 16,252. Supreme Court U. S., October term, 189–. Term No., 154. Quincy A. Shaw, P. E., *vs.* Murray M. Kellogg. Stipulation in regard to exhibits. Filed Feb'y 23, 1898.

DENVER, COLORADO, *February* 18, 1898.

Hon. JAMES H. MCKENNEY,
Clerk U. S. Supreme Court, Washington, D. C.

DEAR SIR: We send you today by express twenty-five copies of a reply brief in the case of Quincy A. Shaw *vs.* Murray M. Kellogg, No. 154.

We also send two packages of original exhibits in the same case—one, a roll containing original exhibits No. 25, transcript of part of official map of Colorado for the year 1868; No. 29, plat prepared by Prof. P. H. Van Diest, showing lands adjacent to initial corner; No. 40, Hayden's geological and topographical map for part of Colorado; No. 41, official map of Colorado for the year 1892. The other package contains the following exhibits: No. 15, photograph of Crestone mountains, at the initial corner of Baca grant No. 4; No. 16, photograph of Crestone mountains adjacent to grant; No. 34, plat of "Completion survey" of northeast corner of Baca grant No. 4; No. 35, manual of instructions to surveyors general, of date February 2, 1855; No. 39, map of Baca grant No. 4, showing mountains at northeast corner of grant as determined by the witness Darby.

We inclose herewith a stipulation of counsel relating to these exhibits. After the case was sent up on certificate to the Supreme Court from the court of appeals these exhibits were returned by the clerk of that court to Denver, and we assume that it is sufficient now to forward them direct to you, with a stipulation as to their identity.

It is not probable that any of these exhibits are necessary for the consideration of the questions before the court; but as they constitute a part of the record, we have thought it best to send them.

There are, however, certain exhibits which are of no value except for use in oral argument and for ocular demonstration, as for example, No. 36, a card-board model, and Nos. 37 and 38, plats of profiles. No. 22½, an official map of the United States, is merely cumulative, as to other maps, and is amply covered by the evidence, as is also No. 23, official map of Colorado for 1866. The same may be said of No. 39, map of Baca grant No. 4, showing mountains at northeast corner.

We have therefore provided in the stipulation that these original exhibits are not necessary, and that the cause may be heard and determined without them. They are simply cumulative in the evidence they furnish. We would say, however, that we included No. 39 in the stipulation, because at the time of drafting the stipulation this map had been mislaid, but has since been found. As it may be useful for the court to have this map, which shows the entire grant as well as the mountains in the northeast corner, we include the same in the documents today transmitted to you by express.

If, under the practice of the court, it is necessary for this stipulation to be put in printed form, will you kindly have that done, and advise us of the expense, and if any further remittance is necessary we shall promptly comply with your demands.

We understand this case is now ready for submission to the court pursuant to the order made in December. We should

be very much obliged to you if you would call the matter immediately to the attention of the Chief Justice, so that the case may be promptly placed in the hands of the judges.

It is a matter of very great importance to us that this case should be determined this spring; and in the event of a decision adverse to us, we shall hope to have a decision in time for us to make, if it seems advisable, an application for a rehearing before the close of the present term of court.

We shall be personally obliged to you if you will do what you can to facilitate the prompt submission of the cause.

Very respectfully yours,

WOLCOTT VAILE.

No. 154.

Brief of Wolcott v Vaile for P. E

Filed Nov. 17, 1897.

UNITED STATES OF AMERICA.

IN

THE SUPREME COURT

QUINCY A. SHAW,
Plaintiff in Error,
vs.
MURRAY M. KELLOGG,
Defendant in Error.

No. 154.
(16,252.)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
Attorneys for Plaintiff in Error.

D. J. KELLY, PRINTER, DENVER.

UNITED STATES OF AMERICA.

IN

THE SUPREME COURT

QUINCY A. SHAW,
Plaintiff in Error,

vs.

MURRAY M. KELLOGG,
Defendant in Error.

No. 154.
(16,252.)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

On the twenty-first day of June, 1860, there was approved, by the President, an act of Congress, entitled "An Act to confirm certain private land claims in the Territory of New Mexico." The sixth section of that act was as follows:

"Section 6. And be it further enacted, that it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the Town of Las Vegas, to select, instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number; and that it shall be the duty of the Surveyor General of New Mexico to make survey and location of the lands so selected by said heirs of Baca, when thereunto required by them; Provided, however, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act and no longer." (12 U. S. Stat., 72. Printed record, page 2.)

Under this provision of law, Baca Grant No. 4 was located on lands which, at the time of the passage of the act, were a part of the Territory of New Mexico, but are now a part of the State of Colorado.

Baca Grant No. 4, as located, was described as follows:

"Beginning at a point on the eastern edge of the valley of San Luis, where the thirty-eighth parallel of north latitude crosses the base of the Snowy Range, dividing the waters of the rivers Arkansas and Del Norte; thence east, along said parallel, four and one-half miles; thence south, along a meridian, twelve miles, thirty-six chains and forty-four links distance; thence west at a right angle, twelve miles, thirty-six chains and forty-four links distance; thence north to the specified parallel of latitude; thence east, with said parallel, to the place of beginning." (Printed record, page 4.)

This suit was brought by the plaintiff, Quincy A. Shaw, claiming as owner of Baca Grant No. 4, above described, containing 99,289.39 acres.

The complaint alleged that the plaintiff was the owner of the following "specifically described premises, situated within the outer boundaries of said Baca Grant No. 4, aforesaid, to wit: section twenty-two (22), township one (1) north, one (1) east, according to the plat of said Baca Grant No. 4, as filed and recorded in the office of the County Clerk and Recorder of said Saguache county, and including in said Section 22 certain mineral-bearing property designated by the defendant as the Eastern Star mine, with other mining lands adjacent thereto, within said Section 22. (Printed record, page 1.)

The complaint alleged the plaintiff's title to be in fee simple; alleged an entry and ouster by the defendant, about the fifteenth of March, 1890, as to the premises specifically described; alleged the unlawful withholding of possession of said premises from the plaintiff, to his damage.

A jurisdictional averment appears in the complaint, as follows:

"And plaintiff alleges that the matter in dispute in this cause arises under the laws of the United States, in this, to wit: that the plaintiff's title is based upon an Act of Congress, approved June 21, 1860, entitled, 'An act to confirm certain private land claims in the Territory of New Mexico,' by which act the heirs of Luis Maria Baca, plaintiff's remote grantors, were authorized to select a certain quantity of 'vacant land, not mineral, in the territory of New Mexico, to be located by them in square bodies not exceeding five in number,' under and by virtue of which said act and within three years after the passage thereof, plaintiff's remote grantors, the heirs of said Luis Maria Baca, did select and locate the lands hereinabove described as Baca Grant No. 4, including the premises now in controversy between

the plaintiff and defendant, all of which said lands, included within said Baca Grant No. 4, were at the time of the passage of the said act within the then boundaries of the Territory of New Mexico, and the location of the same was approved by the proper officers of the Land Department of the United States, and said land was, by the Surveyor General of the State (then territory) of Colorado, thereunto duly authorized, certified to be non-mineral land; and the plaintiff claims that, by virtue of said statute, and the finding of said Surveyor General, as to the non-mineral character of said land, at the time of its selection and location, the title to all of said premises passed to the heirs of Luis Maria Baca, and through them, by divers conveyances, to this plaintiff, notwithstanding the fact of subsequent discoveries of precious metals within the boundaries of the said Baca Grant No. 4, hereinabove described.

"The defendant, on the other hand, claims and asserts that, under the proper construction of said Act of Congress of June 21, 1860, hereinabove referred to, and notwithstanding the finding of the Surveyor General of the state (then territory) of Colorado as to the non-mineral character of said lands at the time of the selection and location thereof, as said Baca Grant No. 4, the subsequent discovery of precious metals, to wit, silver and gold, upon that portion of the said grant by the said defendant so taken possession of and occupied, excludes from said grant the premises by him so taken possession of, and that this plaintiff has no right thereto." (Printed record, page 1.)

The defendant's answer denied plaintiff's ownership or right to possession; denied that the location of Baca Grant No. 4, under the Act of June 21, 1860, was ever approved by the proper officers of the Land Department of the United States, or that the Surveyor General was authorized to, or did, certify the land in dispute to be non-mineral; and alleged that, at the time of the loca-

tion of Baca Grant No. 4 this land was known to be mineral. The answer then alleged that defendant's grantors discovered a gold-bearing vein on the premises in controversy, in April, 1876, and had located thereon the Eastern Star Mine; that defendant and his grantors had since then complied with the laws of the United States relating to the possessory right to mining claims, in such manner as to entitle them to possession and ownership of said premises as a mining claim. A replication was filed to this answer.

The admissions of the pleadings, and the evidence submitted, show the following facts:

A.—The specific land in controversy is worth more than $2,000, and is now known to be mineral in character. There is no evidence to show that it was known to be mineral, prior to 1876. It is within the limits of the Baca Grant No. 4. (Printed record, page 2.)

B.—The Act of Congress entitled "An Act to *confirm* certain private land claims in the territory of New Mexico," approved June 21, 1860 (12 Stat., 72), contained in Section 6 thereof, the grant to the heirs of Louis Maria Baca, hereinabove set out.

C.—Under this Act of Congress, the following communications and certificates were made and issued by the officers of the Land Department of the United States:

1. Under date of December 8, 1860, the Surveyor General of New Mexico gave to the heirs of Luis Maria Baca a certificate that the amount of land they were entitled to select, under the Act of

June 21, 1860, was 496,446.96 acres, to be taken in five square bodies, upon any of the unoccupied lands, not mineral, of New Mexico. (Printed record, page 3.)

2. Under date of February 5, 1863, the Surveyor General of New Mexico certified to the Commissioner of the General Land Office that the heirs of Luis Maria Baca had selected the land hereinabove described; that this location was the fourth of the series; that it contained 99,289.39 acres, and transmitted copy of the application, which, after giving a description of the land, as above set forth, contained this statement:

"I further state that the said land is entirely vacant, not claimed by anyone; is not mineral, but located for purposes of arable and pastoral agriculture, and is within the limits of the territory of New Mexico, as established in the organic act." (Printed record, pages 3 and 4.)

The territory of Colorado was created by Act of Congress, approved February 28, 1861, and included a portion of what was the territory of New Mexico.

3. Francis M. Case, the Surveyor General of Colorado and Utah, on February 24, 1863, wrote to the Commissioner of the General Land Office, advising him that he had received from the Surveyor General of New Mexico a copy of the application for the location of Baca Grant No. 4, above mentioned, and he adds these words:

"I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca 'floats,' and should locate it as this is located, for the reason that, in his opinion, it would cover rich minerals in the mountains." (Printed record, pages 4 and 5.)

4. The Commissioner of the General Land Office, on the thirteenth of March, 1863, answered this communication, and, among other things, said:

"It is necessary, before the application can be approved by this office, that it be accompanied by the certificates of the Surveyor General and the Register and Receiver, that the land selected is vacant and not mineral * * * ; especially should the character of the location as to minerals be carefully ascertained, after the important statement of ex-Governor Gilpin, which you communicated in your official letter to this office. Whenever you shall have acquired good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable you to do so, you will transmit to this office your official certificate, setting forth these facts.

"You will also correspond with the Register and Receiver of Colorado, when they enter upon their official duties, communicating to them the substance of this communication, and call upon them to furnish their certificate, when able, under the same conditions that your own is to be furnished under, which, when received, you will forward to this office. (Printed record, page 5.)

5. On October 13, 1863, John Pierce, Surveyor General of Colorado and Utah, successor to Francis M. Case, advised the Commissioner of the General Land Office that application had been made for survey of this grant, and he transmitted a copy of a contract made by him with Deputy Surveyor A. Z. Sheldon, with copy of the instructions to said Deputy. (Printed record, pages 5 and 6.)

6. On November 2d, 1863, the Commissioner of the General Land Office returned this contract, without approval, and called attention to the former statement of the Surveyor General as to the remark attributed to ex-Governor Gilpin, and to the

Commissioner's previous letter of March 13th, 1863, as to the necessity of care in ascertaining the facts. (Printed record, pages 6 and 7.)

7. Under date of December 12th, 1863, the Surveyor General answered the communication last above mentioned, stating, among other things, as follows:

"I herewith transmit my certificate that the lands are 'not mineral and are vacant.'

"You refer to a letter of the former Surveyor General of this district, in which he says that he supposes this location was made by Mr. Gilpin, 'for the reason that, in his opinion, it would cover rich mineral lands.' I do not believe that at the time Mr. Case wrote that letter he had the least idea that the float, as located, covered any mineral lands.

"I have signed the accompanying certificate, partly from my own knowledge of the country, but mostly for the following reasons:" (Printed record, pages 7 and 8.)

The Surveyor General then proceeds to give several reasons why he certifies that the land is not mineral, and he sends with this letter a certificate, as follows:

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., December 5th, 1863.

"SIR—This is to certify that from good and sufficient evidence, I am perfectly satisfied that the lands on which the heirs of Luis Maria Baca have located their Grant No. 4, in the San Luis valley, and marked out by a survey made by Albinus Z. Sheldon, in November, 1863, is not mineral and is vacant. "JOHN PIERCE,

"*Surveyor General of Colorado and Utah.*"

(Printed record, page 8.)

8. No other evidence having been sent to the Commissioner, and no certificate from the Register and Receiver having been forwarded, the Commis-

sioner wrote to the Surveyor General on January 16, 1864, calling attention to previous instructions given, to the effect that the Surveyor General should accompany the official rendition of the certificate with his own statement, and *also* that of the *Register and Receiver*, setting forth the fact that the land selected was vacant and not mineral. The letter then proceeded to state that the evidence furnished was not sufficient, that the certificate was not based upon actual knowledge, and referred again to the statement of ex-Governor Gilpin, and called attention to the fact that the statement of the Register and Receiver had not been received. (Printed record, pages 8 and 9.)

9. Up to this time the notes of survey made by Albinus Z. Sheldon had not been transmitted to Washington, but, from facts which will be presented more fully in the argument, it appears that Mr. Gilpin, who was then the claimant of the grant, went personally to Washington, and submitted additional evidence, including the surveyor's notes, as to the character of the land, as well as of the survey, together with a certificate of the Register and Receiver, which last named certificate reads as follows:

"COLORADO TERRITORY, }
"GOLDEN CITY, December 5, 1863. }

"SIR:—This is to certify that, from good and sufficient evidence, we are perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their Grant No. 4, in the San Luis Valley, and marked out by a survey made by Albinus Z. Sheldon in November, 1863, is not mineral, and is vacant.

"G. M. CHILCOTT, Register,
"*Land Office, Colorado District.*
"C. B. CLEMENTS, Receiver,
"*Land Office, Colorado District.*"

(Printed record, page 10.)

10. The surveyor, Albinus Z. Sheldon, after having made a survey of the premises, at the end of his notes gives a general description, in the latter part of which is contained the following statement:

"Saw no indications of the precious metals or minerals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle, set forth in the notes." (Printed record, page 11.)

11. Thereupon, on February 12, 1864, the Commissioner of the General Land Office again wrote to John Pierce, the Surveyor General, stating that he had considered his report respecting the survey made in November, 1863, by Deputy Surveyor Albinus Z. Sheldon, of what is known as the Luis Maria Baca float, in San Luis Park, Colorado; and, after calling attention to some irregularity as to the payment for the survey, and suggesting methods as to how the irregularity may be corrected, proceeds as follows:

"The original field notes, duly verified and authenticated, must be filed in the Surveyor General's office of Colorado. Upon bringing these to the usual satisfactory tests, and finding the same all regular and correct, *you are authorized*, in virtue of the aforesaid sixth section of the said Act of twenty-first of June, 1860, *to approve the said survey*, but in your certificate of approval you will add the special reservation stipulated by the statute—but not to embrace mineral land, nor to interfere with any *other vested* rights, if such exist."

"*The statute does not order the issue of a patent.* The aforesaid law of twenty-first June, 1860, with your plat, approved in the manner indicated, will, therefore, constitute the evidence of title." (Printed record, pages 9 and 10.)

12. After the receipt of the letter last above-mentioned, and under date of March 15, 1864, the field notes of the survey were approved by the Surveyor General, in the following language:

"SURVEYOR GENERAL'S OFFICE, }
"DENVER, C. T., March 15, 1864. }

"The foregoing field notes of the survey of Grant No. 4, heirs of Luis Maria Baca, executed by Albinus Z. Sheldon, under his contract of the seventh day of October, 1863, having been critically examined, the necessary corrections and explanations made, the said field notes and the survey they describe are hereby approved.

"JOHN PIERCE,
"*Surveyor General, Colorado and Utah.*"

(Printed record, page 11.)

And thereupon the original plat of the survey of Baca Grant No. 4, was approved by the Surveyor General, in the following language:

"The above map of the boundary lines of Grant No. 4, of the heirs of Luis Maria Baca, in San Luis Valley, Colorado territory, as surveyed by Albinus Z. Sheldon, under his contract bearing date the seventh day of October, 1863, is strictly conformable to the field notes on file in this office, which have been examined and approved, subject to the conditions and provisions of section 6 of the act of Congress approved June 21st, 1860.

"JOHN PIERCE,
"*Surveyor General, Colorado and Utah.*"

"Surveyor General's Office, Denver, March 18, 1864."

(Printed Record, page 11.)

13. The transcript of the field notes thus approved, and a plat of the survey thus approved, were, on March 29, 1864, transmitted to the Com-

missioner of the General Land Office, and the receipt of the same was acknowledged on May 4, 1864 (printed record, page 11), and no objection was then or ever thereafter made thereto.

From and after the date of the receipt of the approved plat and survey, the Government, by many acts, recognized this grant and that the title thereto had passed from the Government to the claimants, the record showing the following, selected by the Court of Appeals from many documents offered in evidence in the trial court:

14. In January, 1868, the owner of the Baca Grant No. 4 asked for the issuance of a patent therefor, notwithstanding the remarks of the Commissioner in his letter to the Surveyor General, bearing date of February 12, 1864. The Commissioner replied as follows:

"Referring to your application of 12th inst. for the issuing of patent for the tract of land in Colorado known as 'Baca Tract No. 4,' I have to state that the selection authorized by the sixth section of the act of 21st of June, 1860, (Stats., Vol. 12, page 72,) *has been made, and the survey executed and reported to this office*, but *as no provision is made in the statute for the issuing of patent*, the survey and statute are the only authorized evidences of title, this office having no authority to issue patents unless the statute expressly orders the same, which is not done in the Baca case, but 'that a grant may be made by a law as well as a patent pursuant to a law is undoubted (6 Cr., 128); a confirmation by a law is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*.' (12 Peters' Reports of the Decisions of the Supreme Court of the United States, page 454.)" (Printed record, page 12.)

15. In the year 1879, under the belief that a change in the phraseology of the law would permit the issuance of a patent for this grant, the owner made a second application for a patent, which resulted in the following official communication from the Commissioner of the General Land Office to the Surveyor General of Colorado:

"'D.' G. B. E.

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., March 21, 1879.

"*Mr. William L. Campbell, Surveyor General of Colorado:*

"SIR:—I have considered the application of Hon. Wm. Gilpin for a patent to the tract of land known as Baca Claim No. 4, in Colorado.

"Section 6, of the Act of Congress approved June 21, 1860, provided that the heirs of Luis Maria Baca might select a quantity of land equal to that claimed by the town of Las Vegas, to be located on vacant, non-mineral land, in New Mexico, in square bodies, not to exceed five in number, the same, when selected by the heirs, to be surveyed and located bythe Surveyor General of New Mexico.

"It was subsequently ascertained that the quantity of land claimed by the town of Las Vegas, and therefore the amount to be selected by the Baca heirs, was 496,446.96 acres.

"In 1863, the Baca heirs selected the tract of land now in question. This was the fourth tract, three having been previously selected, and therefore this tract was designated as Baca Claim No. 4. It contains 99,289.39 acres, being one-fifth of the amount granted to said heirs.

"This was, at the time of its selection, in the territory of Colorado, but at the date of the Act making the grant—June 21, 1860—the tract was a part of the territory of New Mexico.

"After the selection of this tract, it was surveyed and *located* by the Surveyor General of Colorado, *he having first determined that the land was vacant and non-mineral.*

"The seventeenth section of the Act of Congress, approved February 28th, 1861, gave the Surveyor General of Colorado the same authority concerning the location of this tract as was originally conferred on the Surveyor General of New Mexico.

"After the selection, but previous to the location, the Commissioner of the General Land Office instructed the Surveyor General of Colorado that as the statute did not authorize the issuing of a patent, the Act of June 21, 1860, and the plat approved by the Surveyor General, would constitute the evidence of title.

"There is no doubt that government may convey and vest the legal title without issuing a patent, as effectually as may be done by patent. *Larriviere vs. Madegan*, 1 Dillon, 455; *Gregnon vs. Astor*, 2 Howard, 319; *3 Opinions of Attorney General*, 350.

"The Surveyor General was authorized by the act *to locate only vacant, non-mineral land.* Unless the contrary appeared, it would be *presumed, from the act of locating*, that the Surveyor General determined the land was not mineral. But, before locating, the Surveyor General had *expressly found and certified that this land was not mineral.*

"*It is now alleged that the land is mineral;* that the Surveyor General approved the plat of survey 'subject to the conditions and provisions of Section 6 of the Act of Congress approved June 21, 1860,' and that, therefore, the grantees cannot hold the land under that act.

"The conditions and provisions of the Act of June 21, 1860, were as respects this question, that the selection and location should be on land determined *at the time of such location*, when the title passed, to be non-mineral land.

"The Act did not intend that if at any subsequent time in the remote future, mineral should be discovered, the title should be unsettled, or that the title should be the subject of controversy through all time, as often as anyone might choose to allege its mineral character.

"The Surveyor General did not undertake, and had no power, to impose conditions not in the Act.

"If, after fifteen years, the question as to the mineral character of the land may be reopened, why may it not be raised again after the lapse of any number of years? If the question may be reopened as to the land granted under the provisions of the Act of June 21, 1860, why may it not as to land acquired under the homestead, pre-emption and other acts of Congress? Would such titles ever be considered secure?

"The question as to the *mineral* or *non-mineral character of this land has been passed upon by competent authority;* the title has passed from the Government and vested in private individuals; this office has no authority to reopen the question; the land cannot longer be regarded as a part of the public domain.

"Mr. Gilpin, who claims this tract of land as the assignee of the Baca heirs, makes personal application for a patent. It is not claimed that the granting act authorized a patent to issue, but that it is authorized by Section 2 of the Act approved March 3, 1869 (15 Stat., 342), and by Section 2447, Rev. Stat. U. S. But those provisions authorize patent to issue only when claims to land have been confirmed by law; that is, where an act of Congress recognizes a claim to specific land, and does not apply to cases where the acts of Congress only authorize a claim to be made thereafter to land, without regard to any specific tract or parcel of land. This office can issue patents only where it is authorized by some act of Congress. The application of Mr. Gilpin for a patent must therefore be refused.

"Very respectfully,

"J. A. WILLIAMSON,
"*Commissioner.*"

(Printed record, pages 12–14.)

16. On June 28, 1884, the Commissioner of the General Land Office wrote the following letter:

"'D.' W. H. W. J. R. D.

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
WASHINGTON, D. C., June 28, 1884.

"W. NIEL DENNISON, ESQ.,
Canon City, Colorado:

"SIR:—I have received, by reference from the Department, your letter of June twelfth instant, addressed to the Honorable Secretary of the Interior, relating to the Baca Location No. 4 ('Gilpin grant'), in which you inquire, first, if said grant is located on mineral or non-mineral land; and second, if prospectors will be allowed to hold any mineral discoveries made on said No. 4 prior to the year 1880.

"In reply to said inquiries, I have to say that by the sixth section of the Act of June 21, 1860 (12 Stat., 71), the heirs of Baca were authorized to select the quantity of land awarded to them, in not more than five square bodies, upon vacant non-mineral land; and it was made the duty of the Surveyor-General to make survey and location of the land selected, of course subject to the conditions imposed as to the character of the land awarded.

"In the case of Location No. 4, in question, the Surveyor-General having first ascertained and determined that that the land selected was vacant and non-mineral, surveyed and located it, and approved the plat of the location, March 18, 1864, and this approved plat, in the absence of any provision of law for the issuing of patent, became the evidence of title in the owner of the land so located.

"On a subsequent application by Governor Gilpin for a patent, it was contended before this office that mineral existed in some part of the location, and, therefore, the grantee could not hold the land under the Act. The matter was fully considered and the following conclusions reached:

"'The conditions and provisions of the Act of June 21, 1860, were, as respects this question, that the selection and location should be on land determined, at the time of such location, when title passed, to be non-mineral.

"'The Act did not intend that if at any subsequent time, in the remote future, mineral should be discovered, the title should be unsettled, or that the title should be the subject of controversy through all time, as often as anyone might choose to allege its mineral character.

"'The Surveyor General did not undertake, and had no power to impose conditions not in the act.

"'The question as to the mineral or non-mineral character of the land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals, and this office has no authority to reopen the question; the land can no longer be regarded as a part of the public domain.'

"You will see by the foregoing that the land in question *was determined, in 1864, by the Surveyor General, whose province and duty it was, to be non-mineral;* the location was then perfected and the title passed. Whether prospectors will be allowed to hold any mineral discoveries thereon prior to or since 1880, must probably rest between them and the *holders of the Location No. 4.*

"Respectfully,

"N. C. McFARLAND,

"*Commissioner.*"

(Printed record, page 14.)

17. On June 8, 1889, the Commissioner of the General Land Office wrote the following letter:

"'D.' W. O. C. W. H. W.

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., June 8, 1889.

"*Jno. Duncan & Co., Westcliffe, Colo.*

"GENTLEMEN:—I am in receipt, by reference, of your letter dated the eighteenth ult., addressed to the Honorable Secretary of the Interior, in regard to mines and minerals within the surveyed limits of 'Baca Claim No. 4,' commonly known as the 'Gilpin grant.'

"In reply I have to say that by the sixth section of the Act of Congress, approved June 21, 1860, the Baca heirs were permitted to select a quantity of land equal to that claimed by the Town of Las Vegas, to be located on vacant, non-mineral land in New Mexico, in square bodies, not to exceed five in number; the same, when selected by the heirs, to be located and surveyed by the Surveyor General of New Mexico.

"It was subsequently determined that each of said tracts should contain 99,289.39 acres, the one-fifth part of the area claimed by the Town of Las Vegas.

"In the year 1863 said heirs selected the tract in question, three other tracts having been previously selected.

"At the time of its selection, this tract was in Colorado, but at the date of the Act (June 21, 1860), the tract was in the territory of New Mexico.

"Thereafter, Mr. Gilpin, who claimed the land as the assignee of the Baca heirs, applied for a patent, which was denied him, for the reason that there was no provision of law for the issuance of patents on these locations.

"Mr. Gilpin was, however, given an approved plat of the official survey of this Tract No. 4, as evidence of title, in connection with the Act of Congrest aforesaid, and his purchase from the heirs.

"In determining the various questions involved in the case, this office, on March 21, 1879, decided that the character of the land involved had already been determined, and the matter, therefore, was *res adjudicata*.

" 'The question as to the mineral or non-mineral character of this land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals. This office has no authority to reopen the question. The land can no longer be regarded as a part of the public domain,' etc.

"The case has, therefore, become final, so far as this office is concerned; and unless authorized to do so by some superior authority, I cannot recognize entries, or filings, within the limits of

said location, as established by the approved survey thereof.

"Very respectfully,
"W. M. STONE,
"*Acting Commissioner.*"

(Printed record, page 15.)

D.—The plaintiff has, through various mesne conveyances, succeeded to the rights of the heirs of Luis Maria Baca, to the lands covered by Baca Grant No. 4, which include the specific premises in controversy in this suit. (Printed record, page 16.)

At the conclusion of plaintiff's evidence, and upon a motion by defendant that the Court direct the jury to find a verdict in defendant's favor, the Court instructed the jury as follows:

"This action, gentlemen of the jury, is to recover a small plot of land in what is known as the Baca Grant No. 4, in the San Luis valley; I think it is in the county of Saguache, but I am not sure whether the county is given in the complaint.

"The plaintiff relies upon an Act of Congress, passed June 21, 1860, by which the heirs of Luis Baca were permitted to locate this tract of land. You have heard the testimony at great length as to the way in which the location was made and surveyed, and all the proceedings in the Land Office in respect to it. Objection is made that the location was not within the time limited by the Act of Congress, which was three years, and that is put upon the ground that there was no sufficient description of the tract located to make it known to the public at large where the location would be, and upon the ground that the initial point from which the survey of the tract would be extended was not at a fixed and determinate point. That was declared in the paper filed with the Surveyor General of New Mexico to be the point where the thirty-eighth parallel of latitude crosses the base of the Snowy Range which divides the waters of the Arkansas and Del Norte Rivers at the eastern

edge of the San Luis Valley. It is said that this is not sufficient to fix the location, and there should have been some monument or some natural object open to the view of all people, from which the lines should be run. Upon that I do not care to enter at length. I shall assume that the testimony which has been delivered before you is sufficient to enable you to determine this point, and that you would determine it under the testimony to have been properly fixed. If the location was so designated as to be understood by the public at large, I am of the opinion that the circumstance that no survey of the location was made within the three years following the passage of the act is not material; a survey was, in fact, made in the latter part of the year 1863, and about six months after the expiration of the three years mentioned in the act. I assume, also, that the survey made by Mr. Sheldon was sufficient in form. The lines were not closed at the northeast corner; there were three or four miles of the north line, and, perhaps, a greater length of the east line, which were not laid at that time, because of the difficulty of traversing the mountains. The surveyor states in his notes that he found it impossible at the season of the year in which he was carrying on the work, to proceed over the mountains, and so the lines were not laid at the time. This survey having been accepted by the officers of the Land Department, and approved by them, it cannot be alleged that it was not in form sufficient; or that there was any defect in it from the circumstance that a portion of the lines were omitted from the survey at the time when it was made.

"Upon that we come to another question, which is the most important in the whole case, and that is, whether mineral lands passed, by the terms of the act, and what was done under it, to the grantees therein. The act itself declared that the location of the tract shall be upon lands vacant and not mineral. The grantees, the heirs of Baca, were not at liberty to select mineral land. The complaint describes the land of which the defendant is said to be in possession, and which he wrongfully with-

holds from the plaintiff, as mineral land; so that you have no question to consider whether the lands were or were not of that character; the plaintiff having averred that they have the character of mineral lands, there is no issue upon that point. So that the question presented and simply stated is whether mineral lands passed under the grant of the Act of June 21, 1860, and, as I have said, the grantees under that act, the heirs of Baca, were required to select lands which were not mineral. In any selection which they could make, they could not determine the quality of the lands in that respect; that is to say, they could not determine in a manner which would be conclusive upon the Government and upon subsequent claimants under the Government, whether the lands were or were not mineral. In order to make a valid determination of that matter, there must be some participation by the Government in the selection; that is to say, the Government must investigate and pass upon the question whether the lands selected were or were not mineral.

"And so we come to the question, whether anything was done by the Government in that direction at any time whatsoever, or up to the time of the approval of the survey of the lands. It is contended for the plaintiff that the act itself, and the selection of the lands under it, make a good title in the grantees named in the act, and it may be true that no other evidence of title was required. I have not looked into that question particularly, whether there was authority in the Government to issue a patent for the land or not. It is said, and it seems to be established by the various communications from the Land Department, and the officers of that department, that they constantly maintain that there was no authority in the Government to issue a patent for the land, and, therefore, they have declined to issue it. Upon all such occasions, the officers of that department declared that the Act of Congress and the survey, with the plat of the land, constituted the title of the grantees under the act. No further communication, and no document or paper, could be issued by the Government in con-

firmation of the title of the grantees. However that may be, if it appeared that the officers of the Land Department in Washington had at any time passed upon the question of the conclusiveness of the grant, and had declared in terms that the land was not mineral, or to that effect, it might be said that the grantees took the land as not being mineral, and, whatever its character, that the question was properly decided by the Government, and binding upon all who might subsequently make claim upon it.

"*It seems upon examination of the testimony which has been offered to you that no such determination was made. The communication upon which the Surveyor General of the Territory of Colorado approved the plat and the notes of survey expressly required, in making such approval, that it should be declared that the lands within the tract were not regarded as mineral.*

"The instruction of the Commissioner of the General Land Office, as found in a letter to the Surveyor General of Colorado, of date February 12, 1864, is that he will be authorized to approve the plat upon finding it to be correct, in the usual way; and the Commissioner adds: 'In your certificate of approval, you will add the special reservation stipulated by the statute, "but not to embrace mineral land, nor to interfere with any other vested rights, if such exist." '

"*That is to say, the Surveyor General of Colorado was authorized to approve the plat in so far as it did not embrace mineral land; the Commissioner of the General Land Office apparently expressly declining to decide the question whether the land selected was or was not of that character.*

"Now, it is true that the Surveyor General did not put these words in his approval. In the approval which he in fact made, he said that it was subject to the provisions of the Act of June 21, 1860.

"*And taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the approval.*

So that I feel bound to say that the approval was with the condition that the plat should not embrace mineral lands as directed by the Commissioner, and if this be the correct construction of the papers and documents, and of the act of the Surveyor General in making the approval, nothing thereafter done by the officers of the Land Department in the way of declaring what the force and effect of the approval might be would at all change the character of the transaction, or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made.

"There are several communications from the department to persons who were more or less interested in the tract, or who assume to have some interest in it, in which the Commissioner, or some one connected with the department, assume to say that the matter of the mineral character of the land was passed upon at the time of the approval of the survey.

"*I cannot give to these communications any effect whatever. We must assume that the Commissioner had no authority to thus construe the decision of his predecessor in office or to give it any other effect than that which it appears to have from the letter of February 12, 1864.*

"*Upon all this, gentlemen, I feel compelled to state to you, upon the principal matter embraced in this case, that the Act of June 21, 1860, and what was done under that Act from time to time, did not vest in the grantees of Louis Maria Baca, and their successors in interest, the mineral lands which may be within the tract located.*

"This, of course, has no effect whatever upon such part of the tract, which seems to be by far the greater part, as is not mineral. That which is pastoral and agricultural only, cannot be correctly described as mineral land, and it would doubtless pass under the grant without any question whatever such as is presented to us here.

"*The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant and which he claims as a mine, is embraced in the Grant to the heirs of Luis Maria Baca, there is, of course, nothing left for you to do but to return a ver-*

dict upon the testimony for the defendant in the suit."

(Printed record, pages 16–19.)

SPECIFICATION OF ERRORS.

The plaintiff in error, who was plaintiff in the trial court, says there is manifest error in the judgment and proceedings of the trial court in this cause, in this, to-wit:

1. The Court erred in sustaining the motion of the defendant that the jury be directed to return a verdict in defendant's favor, to which ruling of the Court the plaintiff at the time excepted. (Printed record, page 16.)

2. The Court erred in directing the jury to return a verdict for the defendant, to which direction of the Court the plaintiff at the time excepted. (Printed record, page 16.)

3. The Court erred in its instructions to the jury in this: That having instructed the jury that if the officers of the Land Department at Washington had passed upon the conclusiveness of the grant, and had declared in terms that the land was not mineral, this determination might be binding as against subsequent claimants. The Court further instructed the jury as follows: "*It seems upon an examination of the testimony which has been offered to you, that no such determination was made;*" to which last instruction of the Court, so given to the jury, the plaintiff at the time excepted.

4. The Court erred in instructing the jury as follows: "*The communication upon which the Surveyor General of the Territory of Colorado approved*

the plat and the notes of survey, expressly required in making such approval that it should be declared that the lands within the tract were not regarded as mineral;" to which instruction of the Court the plaintiff at the time excepted. (Printed record, page 19.)

5. The Court erred in his instructions to the jury in this, to wit: That, after having stated to the jury as follows, "The instruction of the Commissioner of the General Land Office, as found in a letter to the Surveyor General of Colorado of date February 12, 1864, is that he will be authorized to appprove the plat upon finding it to be correct, in the usual way, and the Commissioner adds: "In your certificate of approval you will add the special reservation stipulated by this statute, but not to embrace mineral land, nor to interfere with any other vested rights, if such exist," the Court then further instructed the jury as follows: "*That is to say, the Surveyor General of Colorado was authorized to approve the plat in so far as it did not embrace mineral land;*" to which last instruction of the Court the plaintiff at the time excepted. (Printed record, pages 19 and 20.)

6. The Court erred in his instructions to the jury in the following statement, to wit: "*The Commissioner of the General Land Office, apparently, expressly declining to decide the question whether the land selected was or was not of that character,*" to which statement, so given in his instructions to the jury, the plaintiff, at the time, excepted. (Printed record, page 20.)

7. The Court erred in his instructions to the

jury in this, that after stating, "It is true that the Surveyor General did not put these words in his approval. In the approval which he in fact made, he said that it was subject to the provisions of the Act of June 21, 1860." The Court then further instructed the jury as follows: "*Taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the approval.*" to which last statement of the Court, so given in his instructions to the jury, the plaintiff, at the time, excepted. (Printed record, page 20.)

8. The Court erred in his instructions to the jury, in the following statement, to wit:

"*So that I feel bound to say that the approval was with condition that the plat should not embrace mineral lands, as directed by the Commissioner.*"

To which instruction the plaintiff, at the time, excepted. (Printed record, page 20.)

9. The Court further erred in giving to the jury the following instruction, to wit:

"*And, if this be the correct construction of the papers and documents, and of the act of the Surveyor General in making the approval, nothing thereafter done by the officers of the Land Department, in the way of declaring what the force and effect of the approval might be, would at all change the character of the transaction, or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made.*"

To which instruction of the Court, the plaintiff, at the time excepted. (Printed record, page 20.)

10. The Court erred in his instructions to the jury in this, to wit: That, after having stated

to the jury as follows: "There are several communications from the department to persons who were more or less interested in the tract, or who assumed to have some interest in it, in which the Commissioner, or some one connected with the department, assume to say that the matter of the mineral character of the land was passed upon at the time of the approval of the survey." The Court then further instructed the jury as follows: "*I cannot give to these communications any effect whatever.*" to which last statement and conclusion of the Court, so given in his instructions to the jury, the plaintiff at the time excepted. (Printed record, page 20.)

11. The Court erred in instructing the jury as follows:

"*We must assume that the Commissioner had no authority to thus construe the decision of his predecessor in office, or to give it any other effect than that which it appears to have from the letter of February 12, 1864.*"

To which instruction of the Court the plaintiff at the time excepted. (Printed record, page 20.)

12. The Court further erred in instructing the jury as follows:

"*Upon all this, gentlemen, I feel compelled to state to you, upon the principal matter embraced in the case, that the Act of June 21, 1860, and what was done under that act from time to time, did not vest in the grantees of Luis Maria Baca, and their successors in interest, the ral lands which may be within the tract located.*"

To which instruction of the Court to the jury the plaintiff at the time excepted. (Printed record, page 21.)

13. The Court further erred in instructing the jury as follows:

"*The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant and which he claims as a mine, is embraced in the grant to the heirs of Luis Maria Baca, there is of course nothing left for you to do but return a verdict upon the testimony for the defendant in the suit.*"

To which instruction of the Court, and each part thereof, the plaintiff at the time excepted. (Printed record, page 21.)

14. The Court erred in permitting the jury to return, and in receiving a verdict in favor of the defendant; to which action of the Court the plaintiff at the time excepted. (Printed record, page 21.)

15. The Court erred in entering judgment in this cause in favor of the defendant; to which action of the Court the plaintiff at the time excepted.

For which errors the plaintiff in error prays that the judgment of the trial Court be in all things reversed.

QUESTIONS SUBMITTED:

The United States Circuit Court of Appeals for the Eighth Circuit submits to this Court three questions for answer:

"*First.*—[1] Was the action of the Commissioner of the General Land Office, or of the Surveyor General of Colorado, in 1863 and 1864, evidenced by the foregoing certificates and communications, a decision by the proper officer that none of the lands in said Baca Grant No. 4 were mineral lands? and

"[2] A valid location upon the ground covered

by said grant of the selection of that tract by the heirs of Baca, under Section 6 of the 'Act to confirm certain private land claims in the territory of New Mexico,' approved June 21, 1860 (12 Stat., 72); or

"[3] Was the action of these officers a refusal to decide that question? and

"[4] Either an attempted or actual location of the selection of said heirs, on *that part only* of the land described as Baca Grant No. 4, which should not, *any time in the then future*, be found to be mineral land?"

The plaintiff in error contends that this question should be answered as follows:

To clause [1], "Yes, as then known"; to clause [2], "Yes"; to clause [3], "No"; to clause [4], "No."

"*Second.*—Was the title to that portion of the lands described as Baca Grant No. 4, which is in controversy in this cause, and which was mineral land, but which was *not known* to be mineral land until 1876, vested in the heirs of Baca and their successors in interest, by the said Act of Congress and the action of the Commissioners of the General Land Office and of the Surveyor General, evidenced by the foregoing certificates and communications?"

The plaintiff in error maintains that this should be answered "Yes."

"*Third.*—Was the direction of the Circuit Court to the jury, to return a verdict for the defendant in this case, right?"

We urgently insist that the answer to this inquiry should be "No."

BRIEF OF ARGUMENT.

It will appear, from the foregoing statement of this case, that the questions at issue arise entirely from the instructions of the Court. It will also appear that the errors complained of relate to the construction which the trial Court placed upon certain documents introduced in evidence, and the conclusions of fact that he derived therefrom, as well as to the application of the law to the ultimate rights of the plaintiff.

The errors as assigned point out specifically the parts of the instructions complained of. The whole subject, however, can be discussed under the following general propositions:

1. As early as May 4, 1864, the title of the Government was divested, and that of the heirs of Baca fully perfected, as to that tract of land designated as Baca Grant No. 4, and the rights of the plaintiff are the same as if Government patent had then been issued for said lands.

2. The proper officers of the Government, after investigation of the facts, determined, in 1864, that the land in controversy was not mineral. That determination is conclusive against all subsequent claimants.

3. No subsequent discovery of mineral could divest the title derived through the grant made by Congress to the heirs of Baca, or except therefrom any portion of the surveyed premises.

I.

As early as May 4, 1864, the title of the Government was divested and that of the heirs of Baca fully perfected, as to that tract of land designated as Baca Grant No. 4, and the rights of the plaintiff are the same as if Government patent had been then issued for said lands.

By the Act of June 21, 1860, the Congress of the United States granted to the heirs of Baca a certain quantity of land, in lieu of an equivalent area claimed by them near the town of Las Vegas, under the treaty of Guadalupe Hidalgo.

This land was not a *donation* to the heirs of Baca. These heirs were claiming to own lands under a title which the Government was bound to protect, under the treaty of Guadalupe Hidalgo. (See documents referred to in the Act of June 21, 1860.) These lands were granted in lieu of the lands so claimed, the area of which was ascertained to the very fraction of an acre, and became the exact measure of the new lands granted. (Printed record, page 3.)

Upon the selection of these lands by the grantees named, the duty was imposed upon the *Surveyor-General* to survey and *locate* the same. No provision was made in the granting act for the issuance of a patent. The Act itself constituted a grant by the Government, which became specific, and attached to the lands selected when the survey and location were made by the Surveyor-General.

The title of the Act of June 21, 1860, shows that it was the intention of Congress to "confirm" the title of the land to the grantees named. (12 U. S. Stats., 71.) This legislative intention is very ap-

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The title of the Act of June 21, 1860, shows that it was the intention of Congress to "confirm" the title of the land to the grantees named. (12 U. S. Stats., 71.) This legislative intention is very ap-

parent, from a subsequent Act relating to the same subject; for, on June 11, 1864, this Act and this section of the Act were amended so as to extend the time as to one of the five parcels referred to, although not the parcel which is now in controversy. The language of the amending Act was that Section 6 should be "so amended as to enable the heirs of Luis Maria Baca to raise and withdraw the selection and location of one of the square bodies of land *confirmed to them by said Act;*" and after designating the particular tract referred to, and authorizing a new selection, the language of the amendatory Act is as follows:

"And upon such selection and relocation, the title to said square body of land, the same being the one-fifth part of the private claim *confirmed to said heirs as aforesaid*, so selected and relocated, shall be and is hereby confirmed to the said heirs of Luis Maria Baca, as fully and perfectly as if the same had been selected and located within three years from and after the approval of the act aforesaid."

13 U. S. Stats., 125.

At a very early date this Court construed a similar act as being an immediate grant. A statute of the State of North Carolina, passed in 1782, provided in its tenth section as follows:

"That 25,000 acres of land shall be allotted for, and given to, Major General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense this State entertains of the extraordinary services of that brave and gallant officer."

The Court used this language concerning that enactment:

"It is clearly and unanimously the opinion of this Court that the act of 1782 *vested a title* in General Greene to 25,000 acres of land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey made in pursuance of that act and returned in March, 1783, gave precision to that title and attached it to the land surveyed."

Rutherford vs. Greene's Heirs, 2 Wheat., 197, 206.

"An act of Congress *confirming* a title makes a legal title without a patent." (Syllabus.)

Grignon's Lessee vs. Astor, 2 How., 319.

"This Court held, in *Strother vs. Lucas*, 12 Pet., 454, 'that a grant may be made by a law as well as a patent, pursuant to a law, is undoubted; and a *confirmation* by a law is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*.'"

Choteau vs. Eckhart, 2 How., 372.

See, also—

Larriviere vs. Madegan, 1 Dill., 455.

Under a statute quite similar to the one now under consideration, this Court also uses the following language:

"It does not require the production of proofs before any commission or other tribunal established for that special pupose, but confirms, *proprio vigore*, the rights, titles and claims to the lands embraced by it, and operates as a grant, to all intents and purposes. Repeated decisions of this Court have declared that such a statute passes the title of the United States as effectually as if it contained in terms a grant *de novo*, and that a grant may be made by a law as well as by a patent pursuant to a law."

Ryan *et al.* vs. Carter *et al.*, 93 U. S., 78, 82.

This, then, was a grant *in præsenti*, which would attach to certain lands, upon the doing of certain things: First, an ascertainment of acreage, which depended on the area of the claim at Las Vegas; and the duty of ascertaining this acreage devolved on the Government, and was immediately performed, the *quantity* of the land thus became definite. Second, the *selection* was to be made by the grantees, and this selection being made, the *locus* of the grant became definite. These two things were to be done, and were done, within three years. A third requirement was embodied in the statute, to be performed by the Government, and not by the grantees. It was not covered by the limitation of three years upon the *right* "granted to the heirs of Baca," but it was a duty imposed upon the Surveyor-General. That duty was to "survey" the land selected, and thereby give precision and the sanction of governmental authority to the boundaries. The duty included also the obligation to "locate" the land, and in so locating to confine it to the character of land fixed by the granting act, to wit: "vacant land, not mineral, in the Territory of New Mexico."

These acts were all performed. The area of land to which the heirs of Baca were entitled under the grant was ascertained by the Surveyor-General of New Mexico, and a certificate thereof was given to the grantees on December 8, 1860. (Printed record, page 3.) The *quantity* on that date became certain.

The heirs of Baca *selected* this tract on December 12, 1862, and on that day requested a survey. (Printed record, page 4.) This fixed the *locus* of the grant. All things which the granting act re-

quired the heirs of Baca to do within three years were then completed six months before the expiration of the time limited.

The Surveyor-General surveyed the land and gave to the heirs of Baca a plat thereof, approved by him. (Printed record, pages 10 and 11.) This gave precision to, and made a governmental record of, the grant.

The Surveyor-General *located* the land, which he could do only upon ascertaining that it was vacant land, not mineral, and was within the territorial limits fixed by the granting act. (Printed record, pages 8, 10, 11 and 13.) The *character* of the land thereby became certain and within the terms of the grant.

These final acts were all completed early in 1864. There was nothing further to be done, either by the grantees or by the Government, to complete the transfer of title. A patent, if issued, would only be *evidence* of the grant. The law did not provide for this documentary evidence. The grant was complete without it. If any special or general law had provided for the issuance of a patent after the completion of all requirements of the statute, the heirs of Baca or their assigns would have been entitled to such patent, because both they and the officers of the Government had duly performed every preliminary act contemplated by the granting statute. The rights of the grantees were, therefore, as complete, and should be considered the same as if they had received a patent for these lands.

We call attention again to the case of *Rutherford vs. Greene's Heirs*, where it was held that the granting statute "vested a title" in General Greene

and "that the survey made in pursuance of the act * * * gave precision to that title, and attached it to the land surveyed." The Court there further held as follows: "That his rights are not impaired by the Act of 1783 and the entry of appellant, all of which are *subsequent to his survey*."

2. Wheat., 206.

In a later case, this Court says:

"When it [the survey] was made and the field notes returned to the Surveyor-General's office, and the description and plat made out in form and approved by the Surveyor-General, it was conclusive evidence as against the United States that the land *granted by the confirmation of Congress* was the same described and bounded by the survey, unless an appeal was taken by either party or an opposing claimant, to the Commissioner of the General Land Office. This consideration depends on the fact that the claimant and the United States were parties to the selection of the land; for, as they agreed to the survey, they are mutually bound and respectively estopped by it."

Menard's Heirs vs. Massey, 8 How., 293, 313.

Under a similar statute, where the agents of the Government were the Register and Receiver, this Court said:

"It rested with the Register and Receiver to ascertain the location of the land confirmed to Cousin, from the evidences of claim recorded and filed with the Register; and having decided where and how the land should be located and surveyed, the courts of justice cannot reverse that decision. The power of revision is vested in the Commissioner of the General Land Office."

Cousin vs. Labatut, 19 How., 202, 209.

Again, the Court says:

"When the surveys were made and the plats returned and approved and recorded by the Surveyor General of Illinois and Missouri, and recognized as valid at the General Land Office (as the patent to Forsyth shows it was), it bound the parties to it, the confirmee and the United States. Nor can either side be heard to deny that the land granted by the Act of 1823 is the precise lot Forsyth was entitled to, such being the settled doctrine of this Court."

Bryan vs. Forsyth, 19 How., 334, 336.

"A legislative confirmation of a claim of land is a recognition of the validity of such claim, and operates as effectually as a grant or quit claim from the Government. * * * If the claim be to land with defined boundaries or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of the title. If the claim be to quantity and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated."

Langdeau vs. Hanes, 21 Wall, 521, 530.

In the case at bar the Land Department of the Government acted in accordance with the well-established principles of law announced in the authorities here cited. While the proceedings were in progress, and before they were completed, the Commissioner of the General Land Office advised the Surveyor General as follows:

"The statute does not order the issue of a patent. The aforesaid law of June 21, 1860, with your plat approved in the manner indicated, will, therefore, constitute the evidence of title." (Printed record, page 10.)

This was written by Commissioner Edmunds, February 12, 1864. Four years later, Commissioner Wilson, on January 14, 1868, in response to an application for a patent, said:

"I have to state that the selection authorized by the sixth section of the Act of June 21, 1860 (Stats., Vol. 12, page 72), has been made, and the survey executed and reported to this office, but as no provision is made in the statute for the issuing of patent, the survey and statute are the only authorized evidences of title. * * * But that a grant may be made by a law as well as a patent pursuant to a law is undoubted; * * * a confirmation by a law is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*." (Printed record, page 12.)

Commissioner Williamson, in 1879, officially announced the same conclusion. (Printed record, page 13.)

The final certificate of approval to the survey of Baca Grant No. 4 bears date of March 15, 1864. The certificate attached to the plat is dated March 18, 1864. We have, however, in the proposition under discussion, mentioned the date of May 4, 1864, as the date at which this title was fully consummated, and the reason for the fixing of this date is that up to that time the matter was the subject of revision by the Commissioner of the General Land Office.

We shall have occasion to discuss, under the next proposition, the relations between the Commissioner of the General Land Office and the Surveyor General, in the performance of duties under this Act. It is sufficient to say here that there is absolutely no law or precedent which requires an affirmative approval by the Commissioner of the

General Land Office, of either the survey or the location. The authority of the Commissioner of the General Land Office in the premises rests only on the fact that he has general supervision and control, under the statute reorganizing the General Land Office, and in matters of controversy an appeal will lie to him; he has the right to *veto*, we may say, the action of the Surveyor-General. But in the absence of objection from the Commissioner of the General Land Office, after facts are called to his attention, the act of the Surveyor-General is final and conclusive as the act of the Government.

The Supreme Court of the United States, in an extended discussion of the subject, and after quoting from Secretary Schurz, uses this language:

"There was nothing in the Act of 1796, *or any subsequent acts*, which required the approval of the Commissioner of the General Land Office, before the survey became final and the plats authoritative. Such a theory, said the Secretary, is not only contrary to the letter and spirit of the various acts providing for the survey of the public lands, but it is contrary to the uniform practice of the department."

Frasher vs. O'Connor, 115 U. S., 102, 114.

In the case at bar, after a very full investigation of the facts relating to the location, and after a demand by the Commissioner for more evidence than had been originally produced, and upon the furnishing of such evidence, the Commissioner in terms authorized the Surveyor General to approve the plat and survey, the latter officer being the one designated by statute to make such approval, and the authorization by the Commissioner being under his general power of super-

vision of the public lands and their disposition. After this was done, the approved plat and transcript of approved field notes were sent, on March 29, 1864, to the Commissioner of the General Land Office (printed record, page 11); and on May 4, 1864, the Commissioner acknowledged their receipt, and made no objection thereto. (Printed record, page 11.)

This Court, speaking of the right of a claimant to a patent, has used this language:

"That right became perfected when the certificate of the Surveyor General and accompanying proofs were received by the Commissioner of the General Land Office and *he found no valid objection to them.*"

Stark vs. Starrs, 6 Wall., 413; see, also, pages 417 and 418.

From and after *May 4*, 1864, as is shown by the numerous documents mentioned in the statement preceding this brief, the Government recognized that the title to this grant had passed. The *absence of objection* on the part of the Commissioner, when the receipt of the papers was acknowledged by him, on May 4, 1864, concluded all proceedings relating to this title. Whatever question might have existed prior to that date, was then closed. Under the authorities we have already cited, and upon the facts existing in this case, from that date on, the title of Baca Grant No. 4 should be considered in the same light as if a Government patent had on that date been issued.

II.

The proper officers of the Government, after investigation of the facts, determined, in 1864, that the land in controversy was not mineral. That determination is conclusive against all subsequent claimants.

1. Who was the proper officer to determine the character of the land on behalf of the Government?

The trial Court, in his instructions to the jury, said:

"If it appeared that the officers of the Land Department *in Washington* had at any time passed upon the question of the conclusiveness of the grant, and had declared *in terms* that the land was not mineral, or to that effect, it might be said that the grantees took the land as not being mineral, and, whatever its character, that the question was properly decided by the Government and binding upon all who might subsequently make claim to it." (Printed record, pages 18 and 19.)

The Court, however, then proceeds to say;

"It seems, upon examination of the testimony which has been offered to you, that no *such determination* was made." (Printed record, page 18.)

We think the trial Court was in error in assuming, as he does, in these instructions, that there should be an express declaration by some officer of the Land Department *in Washington*, that the land was not mineral. The Court confuses the legal duties of the several officers of the Land Department.

We confidently assert that there is absolutely nothing in the statutes, from one end to the other, up to the time of the approval of this location, that requires the affirmative action of the Commissioner

of the General Land Office, or of any other officer in Washington, in determining either the correctness of the survey or the quality or nature of the land selected and located. These are duties uniformly placed upon the *Surveyor General*, from whose decision an appeal will lie to the Commissioner of the General Land Office, as will also an appeal from the latter lie to the Secretary of the Interior.

The only statute which we have been able to find that requires an approval by the Commissioner of the General Land Office applies only to lands in the state of California, and it was passed after the approval of the survey of Baca Grant No. 4. It is the Act of July 1, 1864 (13 Stats., 332), entitled "An act to expedite the settlement of titles to lands in the state of California." It provides for the transmission to the Commissioner of the General Land Office of the survey and plat, and says: "If the survey and plat are approved by the said Commissioner, he shall endorse thereon a certificate of his approval." (See Section 1.) The language of the act shows that it has reference to no lands except those situated in California.

There was a subsequent act for the purpose of quieting land titles in California, passed July 23, 1866 (14 Stats., 218.) The eighth section of the last mentioned act provided, in certain contingencies, as follows:

"It shall be the duty of the Surveyor General of the United States for California * * * to cause the lines of the public surveys to be extended over such land, and he shall set forth in full the situation of such grant and according to the lines of public surveys, the quantity of land confirmed

in such final decree, * * * and all the land not included in said grant, as so set forth, shall be subject to the general land laws of the United States."

It will be observed that the authority given to the Surveyor General in this last-mentioned statute is very similar to that given to the Surveyor General in the Act of June 21, 1860, which provided that—

"It shall be the duty of the Surveyor General of New Mexico to make survey and location of the lands so selected by the heirs of Baca."

This Court has, however, held repeatedly and in emphatic language, notwithstanding the previous Act of July 1, 1864, that the plats and surveys made by the Surveyor General, under Section 8 of the Act of July 23, 1866, need not be approved by the Commissioner of the General Land Office.

Frasher vs. O'Connor, 115 U. S., 102.
McCreery vs. Haskell, 119 U. S., 327.
Tubbs vs. Wilhoit, 138 U. S., 134.

As the Act of July 1, 1864, was, in any event, enacted after the rights of the heirs of Baca had matured, it could, of course, not affect the question in controversy, even if it had related to lands generally in the United States.

There is one other act which seems to contemplate an approval by an officer *in Washington*, and that is the general railroad right-of-way act of March 3, 1875, which contemplates an approval by the *Secretary of the Interior*.

18 U. S. Stats., 482.

It is possible that the trial Court was led to

the view he entertained as to the necessity of an approval *in Washington*, by the familiar course of procedure under this railroad right-of-way act. It, however, needs no argument to show that this Act, passed as it was in 1875, and relating only to the rights-of-way of railroads, cannot be used in any way as an authority for the position assumed by the Court in this case.

It is undoubtedly true that the Commissioner of the General Land Office, and, above him, the Secretary of the Interior, have the power of supervision, and may direct subordinate officers as to how they shall execute the duties imposed upon them by law, in such a way as best to protect the interests of the Government and of its citizens; any regulations in that behalf, of course, to be not inconsistent with the statutes. This relation of the superior officers of the Land Department to subordinate officials is well discussed in the case of *Knight vs. U. S. Land Association*, 142 U. S., 161, 177.

The Surveyor General is an officer that has been recognized by the laws of the United States, almost from the time of the foundation of the Government, and long before the original organization of the General Land Office, and duties have by statute been specifically imposed upon that officer from the earliest time.

It is interesting to observe the connection of all the statutes, one with another, from the earliest period, relating to the powers and duties of the Surveyor General.

The Act of February 28, 1861, creating the territory of Colorado, provided for a Surveyor Gen-

eral, fixed his duties and, among other things, provided that his duties, powers, obligations and responsibilities should "be the same as those of the Surveyor General of *New Mexico*, under the direction of the Secretary of the Interior, and such instructions as he may from time to time deem it advisable to give him."

12 U. S. Stats., page 176.

The Surveyor General of New Mexico was given certain comprehensive powers by the Act of July 22, 1854, with the additional provision that his "power, authority and duties shall be the same as those provided by law for the Surveyor General of *Oregon*."

10 U. S. Stats., 308.

The powers and duties of the Surveyor General of Oregon are set forth in the Act of September 27, 1850, and certain supplementary Acts, and, after providing for specific powers and duties, this statute also provided that the Surveyor General "shall have the same authority, perform the same duties respecting the public lands and private land claims * * * * as are vested in and required of the Surveyor of Lands in the United States *northwest of the Ohio*, except as herein provided."

9 U. S. Stats., 496.

The powers of the Surveyor of Lands in the United States northwest of the Ohio were fixed by the Act of May 18, 1796, where they are specifically and at large set forth.

1 U. S. Stats., 464.

So that we find that various statutory provisions, from 1796 down to the creation of Colorado Territory, taken together, provide for the powers and duties of the Surveyor General of the territory of Colorado, the earliest of these Acts being a number of years before there was a Commissioner of the General Land Office.

All of these statutory provisions relating to the Surveyor General designated him as the person to survey and locate public lands and private land claims, and did not make the validity of his acts in any way dependent upon an affirmative approval by any superior officer. His superior officer was, for a time, the Secretary of State; at another time, the Secretary of the Treasury; and at another time, the Secretary of War. The Department of the Interior was created in 1849. But in none of these acts was there any provision requiring the affirmative approval by the Secretary, or any other officer, of the acts done by the Surveyor General.

The General Land Office was originally established by Act of April 25, 1812, and the chief officer was to be called the "Commissioner of the General Land Office." It was made an office of the Treasury Department. The duties of the Commissioner of the General Land Office were thus defined:

"Under the direction of the head of the department, to superintend, execute and perform all such acts and things touching or respecting the public lands of the United States, and other lands patented or granted by the United States, as have heretofore been directed by law to be done or performed in the office of the Secretary of State and the Secretary and Registrar of the Treasury, and of the Secretary of War, or which shall hereafter by law be assigned to the said office."

2 U. S. Stats., 716.

In this Act nothing whatever was said about any approval, by the Commissioner of plats, surveys or locations made by the Surveyor General.

By the Act of July 4, 1836, the General Land Office was reorganized, and the first section of that Act provided:

"That from and after the passage of this Act, the executive duties now prescribed, or which hereafter may be prescribed, by law, pertaining to the surveying and sale of the public lands of the United States, or in any wise respecting said public lands, and also such as relate to private claims of lands, and the issuing of patents for grants of land under the authority of the Government of the United States, shall be subject to the *supervision and control* of the Commissioner of the General Land Office, under the direction of the President of the United States."

5 U. S. Stats., 107.

There was nothing whatever in this Act which required the Commissioner of the General Land Office to approve plats, surveys or locations made by the Surveyor General, but the general language used in reference to his power of supervision and control, manifestly left the matter to his discretion and judgment, as to how surveys and locations should be treated and authenticated.

By the Act of May 30, 1862, which was subsequent to the statutory grant to the heirs of Baca, but prior to the location of Baca Grant No. 4 and the survey thereof, it was provided:

"That the printed manual of instructions relating to the public surveys, prepared at the General Land Office, bearing date February 22, 1855, the instructions of the Commissioner of the General Land Office, and the special instructions of the Surveyor General, when not in conflict with said printed

manual, or the instructions of said Commissioner, shall be taken and deemed to be a part of every contract for surveying the public lands of the United States."

12 U. S. Stats., 409.

The manual of February 22, 1855, from that time on, was a matter of statutory obligation as to the surveys of public lands. That manual, however, thus adopted by statute, provided, among other things, as follows:

"The original field books, each bearing the written approval of the *Surveyor General*, are to be substantially bound into volumes of suitable size, and retained in the Surveyor General's office, and certified transcripts of such field books * * * are to be forwarded from time to time to the General Land Office."

This manual also provided for a form of approval of plats and surveys, which was to be signed only by the *Surveyor General*.

Now, it was pursuant to a long-established course of legislation that the provisions of the particular grant in controversy were enacted; and the *only* officer mentioned in the grant, on whom any duty is imposed, is the *Surveyor General*. The language of the act is:

"And it shall be the duty of the *Surveyor General* of New Mexico to make survey *and location* of the lands so selected by said heirs of Baca, when thereunto required by them." (Printed record, page 2.)

We shall not dispute the proposition that it would be within the power of the Secretary of the Interior, or of the Commissioner of the General Land Office, under the general jurisdiction of those

officers, giving supervision and control over the survey and disposition of the public lands, to make a rule that surveys and locations should, before becoming finally effective, receive the express approval of the Commissioner of the General Land Office. But no such rule had ever been made, and the error of the trial Court is in assuming, as matter of law, that the proper officer to pass upon the question of location, including the character of the land, was some officer *in Washington*, and that such officer must *in terms* declare his decision. The whole current of legislation shows that questions of this character were to be passed upon by the *Surveyor General*, and that his action is conclusive, except as it may be controlled or modified by subsequent action on the part of the Commissioner of the General Land Office or the Secretary of the Interior.

It is not apparent how any distinction could be made by the Court below, between the authority of the Surveyor General as to the survey itself and as to the location, in so far as the latter determines the character of the land located.

The proposition which we are here discussing from original sources, that there is nothing in the law requiring affirmative action of the Commissioner of the General Land Office to support the validity of the acts of the Surveyor General, has been the subject of judicial cognizance by this Court.

We have already called attention to the case of *Frasher vs. O'Connor*, 115 U. S., 102, where it was said:

"There was nothing in the act of 1796, or any subsequent acts, which required the approval of

the Commissioner of the General Land Office before the survey became final and the plats authoritative."

In a later case, the whole subject was again canvassed by this Court. In that case it was urged, as against the operation of a certain statutory provision:

"That the township plat was not *in terms* approved by the Commissioner of the General Land Office."

The Court, in disposing of this question, quotes approvingly from a decision of the Secretary of Interior, of date August 7, 1877, which was in the following language:

"By the Act of Congress approved May 1, 1796 (1 Stats., 464), 'providing for the sale of the lands of the United States in the territory northwest of the river Ohio, and above the mouth of the Kentucky River,' the Surveyor-General was authorized to prepare plats of the townships surveyed, to keep one copy of the same in his office for public information, and to send other copies to the 'places of sale' and to the Secretary of the Treasury. The present local land offices are equivalent to the 'places of sale' mentioned in the act of 1796, and as a matter of practice, from that date to the present time the township plats prepared by the Surveyor-General have been filed by him with the local officers, who thereupon proceeded to dispose of the public lands according to the laws of the United States. There is nothing in the Act of 1796, or in the subsequent acts, which requires the approval of the Commissioner of the General Land Office before said survey becomes final and the plats authoritative. Such a theory is not only contrary to the letter and spirit of the various acts providing for the survey of the public lands, but is contrary to the uniform practice of this department. There can be no doubt but that under the Act of July 4,

1836, reorganizing the General Land Office, the Commissioner has general supervision over all surveys, and that authority is exercised whenever error or fraud is alleged on the part of the Surveyor-General."

Tubbs vs. Wilhoit, 138 U. S., 134, 143.

After quoting from the Secretary of the Interior, the Court remarked:

"This view of the Secretary was referred to and held to be correct, in *Frasher vs. O'Connor*, 115 U. S., 102, 114."

In a much earlier case the Court used this language:

"A survey made under the direction of *the officer designated to have it made*, and approved by him, was final and conclusive, unless an appeal were taken to the Commissioner of the General Land Office."

Dent vs. Emmeger, 14 Wall., 308, 313.

See also cases already cited, to wit: *Menard's Heirs vs. Massey*, 8 How., 293, where the field notes returned to the *Surveyor-General's* office, and the description and plat, made up and approved by the Surveyor-General, were held conclusive, and *Bryan vs. Forsyth*, 19 How., 334, 336.

In the case of *Willot vs. Sandford*, 19 How., 79, the Court remarked:

"When the survey of 1817 for Dissonet's land was recognized at the *Surveyor General's* office as properly executed, which was certainly as early as 1823, then Dissonet had a title that he could enforce by the laws of Missouri."

From the course of legislation here set forth, and from the authorities cited, when taken in

connection with the particular statute under which the plaintiff claims title, it is certainly very clear that the particular officer of the Government whose duty it was to determine the character of the land selected, and to make the location of the grant thereon, was the Surveyor General, subject only to the power of supervision and control on the part of the Commissioner of the General Land Office.

Commissioner Edmunds, in some of his instructions as to this case, speaks of approval in his office. Thus, in his letter of March 13, 1863, he says:

"It is necessary, before the application *can be approved by this office*, that it be accompanied by" certain certificates. (Printed record, page 5.)

This was repeated in the letter of November 2, 1863. (Printed record, page 6.)

These expressions were manifestly not intended to convey the idea that on final acceptance of the application, the Commissioner would *endorse upon the papers* the fact of his approval, *in terms*, or issue any *written declaration of approval*. In view of the existing law and the established practice of the department, these words manifestly meant that unless the prescribed conditions were complied with, the Commissioner would, under his power of supervision, *disapprove* the application and *overrule* the action of the Surveyor General.

That this was what Commissioner Edmunds meant by those words, is demonstrated also by his own subsequent acts. When the contract and instructions for the survey of the selected lands were sent to him, in October, 1863. (printed record, pages 5 and 6,) he disapproved them, there being

no evidence that the lands selected were vacant and non-mineral. (Printed record, page 6.) When a certificate of the Surveyor General was then forwarded, with an explanatory letter, (printed record, page 7,) he again expressed his disapproval, because "the evidence furnished by you is *not sufficient*, in the opinion of this office, to prove that the selection No. 4 does not cover valuable mineral deposits." (Printed record, page 8.)

When, then, additional evidence was furnished, and he had no further objection to make, what course did he pursue? He did not himself endorse an approval or make in terms some written declaration of his conclusion. That would not accord either with the law or with the practice of his office. He says to the Surveyor General:

"*You* are authorized, in virtue of the aforesaid sixth section of the said act of twenty-first of June, 1860, to approve the said survey." (Printed record, page 10.)

When, then, the survey and plat, bearing the approval of the Surveyor General, are sent to him, he acknowledges their receipt and makes no objection thereto. Immediately afterwards he incorporated the plat into the Government maps, reported the survey to the Secretary of the Interior, who in turn included it in his report to the President, and the President transmitted the report to Congress.

Ex. Doc. No. 1, H. R. 38th Cong., 2d Sess.
Report Sec. Interior, 1864, pages 24 and 95.

From the law relating to the subject, from the practice of the department, and from the course pursued in this particular case, we submit that it

is a matter beyond controversy that the Surveyor General was the officer whose duty it was, as the representative of the Government, to decide as to the character of the land, subject only to the supervisory power of the Commissioner, and that the action of the Surveyor General, when received without objection by his superior officers, became final.

Commissioner McFarland, speaking of this particular transaction, says: "The land in question was determined in 1864, by the Surveyor-General, *whose province and duty it was*, to be non-mineral. The location was then perfected and the title passed." (Printed record, page 15.)

The only determination *in Washington*, contemplated by the law, was that the final decision of the Surveyor General should be there received, with knowledge of the evidence, and without objection by the Commissioner. Such determination was made.

2. The Surveyor General did determine the land to be non-mineral, and this decision was accepted by the Commissioner, with full knowledge of the evidence, and without any objection.

The evidence as to the determination by the proper officers, as to the character of the land located is very strong. Very great pains were taken in investigating the question. It was not a mere *pro forma* transaction. Governor Gilpin was interested in the grant, through a contract with its owners, and afterwards became its grantee, by conveyance. The Commissioner was advised by the first Surveyor General of Colorado that Governor Gilpin, in casual conversation, had expressed

an opinion that this selection would cover rich mineral in the mountains. (Printed record, page 5.)

This suggestion, although in the nature of mere gossip, caused the Commissioner to exercise very great care in his supervision of proceedings relating to the location of this grant. He had already required, for the satisfaction of his office, that when application was sent for any particular body of lands selected by the heirs of Baca, the final rendition of the certificate should be accompanied by a statement from the Surveyor General, and a like statement from the Register and Receiver, that the land was "vacant and not mineral."

In the letter of instructions of March 13, 1863, special prominence was given to this requirement, by reason of the statement attributed to ex-Governor Gilpin, the Commissioner saying:

"Especially should the character of the location, as to minerals, be carefully ascertained, after the important statement of ex-Governor Gilpin, which you communicated in your official letter to this office." (Printed record, page 5.)

And the Commissioner then proceeds to say:

"Whenever *you* shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable you so to do, you will transmit to this office your official certificate setting forth these facts.

"You will also correspond with the Register and Receiver of Colorado, when they enter upon their official duties, communicating to them the substance of this communication, and call upon them to furnish their certificate, when able, under the same conditions that your own is to be furnished under, which, when received, you will forward to this office." (Printed record, page 5.)

It is unquestionable that the Surveyor General did, in form, and with emphasis, himself make the decision and certify to it, in accordance with these instructions. Under date of December 5, 1863, he certifies to the Commissioner, as follows:

"This is to certify that from good and sufficient evidence I am perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their Grant No. 4, in the San Luis Valley, and marked out by a survey made by Albinus Z. Sheldon, in November, 1863, *is not mineral*, and is vacant." (Printed record, page 8.)

Except for the directions given by the Commissioner of the General Land Office, this certificate, if it stood alone, would, under the law, be a final and authoritative decision upon the question. But, under his power of supervision, the Commissioner had required additional evidence to be transmitted, and when Surveyor General Pierce, without transmitting any other evidence, sends his own certificate, as here quoted, with a letter explaining the grounds upon which he makes the certificate, it proves not to be satisfactory to the Commissioner of the General Land Office, and the reason again exists in the statement attributed to ex-Governor Gilpin by Surveyor General Case. (Printed record, page 9.)

That statement, so attributed to ex-Governor Gilpin, becomes ultimately an element of strength in this title, rather than an element of weakness, because it invokes a full investigation of the facts on the part of the Commissioner, before the papers are allowed to pass the scrutiny of his office.

Now, after this second disapproval, which bears date of January 16, 1864, what follows? The evi-

dence shows, by necessary deduction, that Governor Gilpin went personally to Washington. We are not advised as to all of the evidence which he there submitted. We do know that he submitted sufficient to satisfy the Commissioner that the land was non-mineral. And we also know that, in addition to the evidence which had been previously transmitted by the Surveyor General, Mr. Gilpin took with him to Washington, the certificate of the *Register and Receiver*, which had not before been sent, together with the notes of the surveyor, who had by that time gone over the grant, and completed his survey, and who had set forth in detail a description of the land and of its character. He found no mineral. (Printed record, page 11.)

On page 10 of the printed record, appears a letter of the Commissioner, transmitting to the Surveyor General various papers, including those last mentioned, and it is stated:

"These papers were deposited in this office by Mr. Gilpin, and are transmitted to you for such action as *you shall deem proper in the premises*, in accordance with the views expressed *in our communication to you dated the twelfth instant*."

This letter was written on February 26, 1864, and the communication referred to was written on February 12, 1864, and appears at page 9 of the printed record.

From the letter of February 12, 1864, it is manifest that, as to the one question upon which the Commissioner had not been satisfied before, he was now fully satisfied; for he makes no further objection whatever as to the sufficiency of the evidence concerning the character of the land; he

gives directions by which the survey may be accepted and approved, and then, in express terms, directs the Surveyor General, upon bringing the survey to the usual satisfactory tests, to approve the survey, in virtue of, and in accordance with, the provisions of the granting act.

We call the attention of the Court to the fact that all the objections which the Commissioner made, from time to time, were based upon the insufficiency of evidence to show that the land was not mineral. When the Commissioner disapproved the contract and instructions to the Deputy Surveyor, in the letter of November 2, 1863, it was because there was no evidence that the land proposed to be surveyed was *not* mineral land. (Printed record, pages 6 and 7.) When, on January 16, 1864, he directed that the approval of the selection should stand *suspended* until satisfactory proof should be obtained, he was referring to proof as to whether Selection No. 4 covered valuable mineral deposits. (Printed record, page 8.)

These having been the particular points of objection to the proceedings, when we find that additional evidence was furnished and produced before the Commissioner, and that he then supersedes his letter, in which he directed a *suspension*, by a subsequent letter in which he directs an *approval*, there seems to be no room for doubt that the evidence as to the non-mineral character of the land had become satisfactory to him; for otherwise he would not, under the circumstances, have directed the Surveyor General to approve the survey.

The evidence, we submit, is conclusive, not only that the Surveyor General, who was designated by statute as the person to locate this land,

determined, after investigation, that the land was not mineral, but also that his finding, with the evidence produced in support thereof, was satisfactory to and accepted by the Commissioner of the General Land Office.

The land in controversy was then determined, in 1864, by the proper officers of the Government, after investigation of the facts, to be non-mineral in character.

3. The determination of the officers of the government concerning the non-mineral character of the land, is conclusive against all subsequent claimants.

The trial Court, in his instructions, correctly announces the law, in these words:

"I have said the grantees under that act, the heirs of Baca, were required to select lands which were not mineral. In any selection which they could make *they* could not determine the quality of the lands in that respect; that is to say they could not determine, in a manner which would be *conclusive upon the Government*, and upon subsequent claimants under the Government, whether the lands were or were not mineral. In order to make a valid determination of that matter, there must be some participation by the Government in the selection; that is to say, the Government must investigate and pass upon the question whether the lands selected were or were not mineral." (Printed record, page 17.)

We admit this, *in toto*, and the statute itself, as already argued, designated the Surveyor General as the representative of the Government who should participate in the location, and who should investigate and pass upon the question whether or not the lands selected were mineral lands.

Not only did the Surveyor General, so designated by the law, represent the Government in this determination and location of the lands, but he did it under the active, personal supervision of the Commissioner of the General Land Office, who thereby became himself a factor in the decision and determination, which thereupon became necessarily conclusive against the Government and subsequent claimants.

We have already called attention to the case of *Menard's Heirs vs. Massey*, 8 How., 293, and the holding of the Court in that case, that the survey, when the field notes were returned to the Surveyor General's office and the description and plat were made out and approved by the Surveyor General, became conclusive evidence, as against the United States; and the Court says:

"This construction depends upon the fact that the claimants and the United States were parties to the selection of the lands, for, as they agreed to the survey, they are mutually bound and estopped by it."

8 How., 314.

The principle here announced is recognized in other cases already cited:

Cousin vs. Labatut, 19 How., 209.

Bryan vs. Forsyth, 19 How., 334.

See also—

Ballance vs. Forsyth, 24 How., 185.

This Court has, in very clear language, in numerous cases, declared the findings of the officers of the Land Department, as to the nature of the land, to be conclusive. The following citations may be selected, out of many:

"For the transfer of that title [of the Government] the law has made numerous provisions designating the persons who may acquire it, and the terms of its acquisition. That the provisions may be properly carried out, the Land Department, as part of the administrative and executive branch of the Government, has been created, to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty, the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function, and therefore it has been held that their judgment as to matters of fact properly determinable by them, is conclusive, when brought to notice in a collateral proceeding. Their judgment in such cases is like that of other special tribunals, upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment."

Smelting Company vs. Kemp, 104 U. S., 636, 640.

"That department [the Land Department], as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different Acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the *nature of the land*, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this Court, in repeated decisions."

Steel vs. Smelting Co., 106 U. S., 447, 451.

"The question whether or not the lands returned as 'subject to periodical overflow' are within the descriptive terms of those granted by the Swamp Land Act—that is, whether they are 'swamp and overflowed'—is a question of fact properly determinable by the Land Department. It is settled, by an unbroken line of decisions of this Court in land jurisprudence, that the decisions of that department, upon matters of fact within its jurisdiction, are, in the absence of fraud or imposition, conclusive and binding upon the Courts of the country [citing authorities.] We are of opinion, therefore, that the decision of the Land Department on a question of the actual physical character of certain lands, is not subject to review by the Courts."

Heath vs. Wallace, 138 U. S., 573, 585.

"It is conceded to be of the utmost importance to the prosperity of the country, that title to lands and to minerals in them, shall be settled and not be a subject of constant and ever-recurring disputes and litigation, to the disturbance of individuals and the annoyance of the public. We do not think that any apprehension of disturbance in titles, from the views we assert, need arise. The law places under the supervision of the Interior Department, *and its subordinate officers acting under its direction*, the control of all matters affecting the disposition of public lands of the United States and the adjustment of private claims to them under the legislation of Congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon, and determine the character of lands to which different parties assert a right, and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of a character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands,

agricultural lands, or mineral lands, and so designate them in the patent which it issues. * * *

"'That the provisions may be properly carried out, the Land Department, as part of the administrative and executive branch of the Government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function, and, therefore, it has been held in various instances by this Court, that their judgment as to matters of fact properly determinable by them is conclusive, when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of any other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment.'" * * * * * * *

"There are undoubtedly many cases arising before the Land Department, in the disposition of the public lands, where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands *obtained at the time* as to their real character. The determination of the fact, by these officers, that they are one or the other, *will be considered conclusive.*"

Barden vs. Northern Pacific R. R., 154 U. S., 288, 326, 327, 329.

We most earnestly, but with very great confidence, contend before this Court, that this land now in controversy was, in 1864, determined by the

Government to be non-mineral, and that determination has, since that date, been absolutely binding and conclusive upon all claimants.

III.

No subsequent discovery of mineral could divest the title derived through the grant made by Congress to the heirs of Baca, or exclude therefrom any portion of the surveyed premises.

This proposition would seem to be logically established by the argument already made. The views expressed by the trial Court demand, however, that it should be further discussed.

Commissioner Edmunds, in his letter of February 12, 1864, after authorizing the approval of the survey, added these words: "But in your certificate of approval you will add the special reservation stipulated by the statute—but not to embrace mineral land, nor to interfere with any other vested rights, if such exist." (Printed record, page 10.)

The trial Court thus construes this language:

"The communication upon which the Surveyor General of the territory of Colorado approved the plat and the notes of survey expressly required, in making such approval, that it should be declared that the lands within the tract were not regarded as mineral," and after quoting the words of the Commissioner, the Court proceeds: "That is to say, the Surveyor General of Colorado was authorized to approve the plat in so far as it did not embrace mineral land; the Commissioner of the General Land Office apparently declining to decide the question whether the land selected was or was not of that character." (Printed record, pages 18–20.)

In using this language, the Court seems to have looked only to the words of this letter alone, and to have ignored the statute making the grant, as well as all the previous acts and directions of the Commissioner.

How it is possible to say that the Commissioner *declined* "to decide the question whether the land selected was or was not of that character" (so far as the duty of decision rested upon him), in the face of the fact that the law did not authorize the selection, survey or location of any land except that which was vacant and non-mineral? How could the Commissioner authorize the approval of the location, unless he was first satisfied that it came within the terms of the law? How can it be said that he declined to decide, when he had expressly directed that, before even a contract for survey could be approved, there must be evidence that the land selected was of the character which Congress had said could be located—that is, that it was non-mineral? How can a refusal to decide be inferred, when the Commission had again ordered suspension of approval of the survey until additional evidence should be furnished of the non-mineral character of the land, and when he finally authorized approval only after such additional evidence had been adduced? Under such circumstances, the *direction to approve* in itself constitutes a *decision* that the land was of the character granted by the act.

The trial Court says: "Taken in connection with the instructions under which he [the Surveyor General] was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the

approval. So that I feel bound to say that the approval was with the condition that the plat should not embrace mineral lands, as directed by the Commissioner." (Printed record, pages 18, 20.)

The Commissioner of the General Land Office was not the grantor of these lands; he did not and could not fix the terms and conditions of the grant. We shall show hereafter that he did not attempt to do so. He could not vary the terms of the grant itself. Any directions of his must be construed in harmony with the statute under which he was acting.

Under well settled law, however, the grant conveyed all the lands surveyed, except so far as they were *known* to be mineral at the time the grant attached to them. A *subsequent* discovery of mineral would not divest the title or exclude from the grant the land so subsequently found to contain mineral.

This proposition was vigorously combated in the Court below. We maintain that it is upheld by a long line of consistent decisions, both in the Land Department itself and in this Court.

This Court, in the case of *Davis's Administrator vs. Weibbold*, 139 U. S., 507, cites with approbation a number of decisions in the Land Department bearing upon this question, to which we briefly ask the attention of the Court:

"It has been repeatedly held by this department that it must appear 'not that neighboring or adjoining lands are mineral in character, or that that in dispute *may hereafter* by possibility develop minerals in such quantity as will establish its mineral, rather than its agricultural, character, but that as a *present fact* it is mineral in character.'"

Cleghorn vs. Bird, 4 Land Dec., 478.

The language here quoted was used by Secretary Lamar, and the same Secretary repeated this enunciation of the law in

Commissioners of Kings Co. vs. Alexander, 5 Land Dec., 126.

Acting Secretary Muldrow used like language in

Magalia Gold Mining Co. vs. Ferguson, 6 Land Dec., 218.

The subject was discussed fully, and the same conclusion reached, by Secretary Vilas in the

Appeal of John Downs, 7 Land Dec., 71.

And again by Secretary Vilas in

Creswell Mining Co. vs. Johnson, 8 Land Dec., 440.

And by Assistant Secretary Chandler in the

Appeal of Thomas J. Laney, 9 Land Dec., 83.

Secretary Lamar adopted the same principle in a decision relating to the very statute in controversy, being the case of

Baca Float No. 3, 5 Land Dec., 705,

Where the Secretary uses these words:

"If selection and location of this claim has been made prior to June 21, 1863, of lands not mineral, *or not known to be mineral*, agreeable to the provisions of said Act, there is no power or authority in the department to cancel such selection," etc.

In the same opinion, Secretary Lamar uses this language:

"A similar question came before your office on the application of William Gilpin for patent to Baca Claim No. 4. In that case it was claimed by the Government that the land was mineral and that the Surveyor General approved the plat of survey subject to the conditions and provisions of the Act of June 21, 1860. Commissioner Williamson, however, held that 'the Surveyor General did not undertake and had no authority to impose conditions not in the act,' and that 'the question as to the mineral or non mineral character of this land has been passed upon by competent authority, the title has passed from the Government and vested in private individuals; this office has no authority to reopen the question; the land can no longer be regarded as a part of the public domain.

"In the case above referred to, it was urged by the government that the mineral character of the land was sufficient to invalidate the selection and location."

(*Ib.*, pages 706 and 707.)

We find here the Secretary of the Interior, who afterwards became a justice of the Supreme Court of the United States, quoting with approbation the decision of Commissioner Williamson, in reference to the very tract of land now in controversy, and upon the very subject under consideration.

In the dissenting opinion in the case of *Barden vs. Northern Pacific R. R. Co.*, 154 U. S., 342, Mr. Justice Brewer cites a circular of instructions, issued by the Commissioner of the General Land Office, on October 12, 1853, construing the term "mineral lands," in an act relating to public lands in California, in which the Commissioner defined these words as meaning "lands on which are situated any *known* salines or mines."

We call attention, also, to a quotation made by Mr. Justice Brewer in this dissenting opinion

from Secretary Schurz's decision, in the case of *State vs. Poley and Thomas* (4 Copp's L. O.)

It seems the following question was presented: "Did the title to lands in said sections vest in the state, *upon survey*, if their mineral character was unknown at the time, and the same were regarded by the officers of the Government as ordinary public lands, not reserved or otherwise appropriated, but subject to disposal under the general laws of the United States?" The Secretary's answer, quoted by Mr. Justice Brewer, is as follows:

"In compliance with the doctrine established by the Courts, it must, I think, be held that the title vested in the State at the *date of the survey*, when the land was not known to be mineral or was not treated as such by the Government. If, following the doctrine of the Courts, the grant of school lands takes effect at the date of survey, can the character of the land, subsequently determined, change or affect said title? If it can, for how long a period can such change be affected? If for three years, why not for ten or fifty, or after the title derived from the State has been transmitted through numerous grantees? For lands confessedly not mineral at the date of survey may, many years thereafter, be ascertained, through improvements in mining operations, to be valuable as mineral lands. To maintain such a doctrine might result in placing in jeopardy the title held by grantees to all the school lands held in California, and could only be authorized by the most positive and clearly expressed provisions of law. In my opinion there is nothing in the Act which can thus be interpreted. I must therefore hold that the discovery of the mineral character of the land in Sections 16 and 36, *subsequent to survey*, does not defeat the title of the State to the same as school lands."

Barden vs. Northern Pacific R. R. Co., 154 U. S., 342.

The views of this Court upon the question here presented have been very clearly and emphatically expressed:

"It is plain from this brief statement of the legislation of Congress that no title from the United States to land *known at the time of sale* to be valuable for its minerals of gold, silver, cinnabar or copper, can be obtained * * * in any other way than as prescribed by the laws specially authorizing the sale of such land. * * * We say 'land *known* at the time to be *valuable* for its minerals,' as there are vast tracts of public lands in which minerals of different kinds are found but not in such quantity as to justify expenditure in the effort to extract them. * * * * * * *

"We also say lands *known at the time* of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the Government under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We therefore use the term *known* to be valuable at the time of the sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued."

Deffeback vs. Hawke, 115 U. S., 392, 404.

"A change in the conditions occurring subsequently to the sale, whereby new discoveries are made or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale."

Colorado Coal and Iron Co. vs. U. S., 123 U. S., 307, 328.

Speaking of placer claims and lodes therein, this Court says:

"The subsequent discovery of lodes upon the ground and their successful working, does not affect the good faith of the application. That must be determined by what was known to exist at the time."

U. S. vs. Iron Silver Mining Co., 128 U. S., 673, 683.

The subject was very elaborately and thoroughly discussed in a later case in the Supreme Court. The whole case is of value, but the gist of it, so far as the question under consideration is concerned, may be found in two passages:

"It would seem from this uniform construction of that department of the government specially entrusted with the supervision of proceedings required for the alienation of the public lands, including those that embraced minerals, and also of the courts of the mining states, federal and state, whose attention has been called to the subject, that the exception of mineral lands from grant, in the Acts of Congress, should be considered to apply only to such lands as were *at the time of the grant* known to be so valuable for their minerals as to justify expenditure for their extraction. The *grant, or* patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated. * * *

"Our conclusion, as already substantially stated, is that Congress only intended to preserve *existing rights* to known mines of gold, silver, cinnabar or copper, and to *known* mining claims and possessions, against any assertion of title to them by virtue of the conveyances received under the townsite act, and not to leave titles of purchasers on the townsites to be disturbed by future discoveries."

Davis's Administrator vs. Weibbold, 139 U. S., 507, 524, 526.

It was contended in the trial below, and the contention seems to have affected the Court, that the opinion of a majority of this Court, in the case of *Barden vs. Northern Pacific R. R. Co.*, 154 U. S., 288, changed the rule which is so clearly set forth in the decisions already cited. We most respectfully insist that it does not have that effect.

The opinion of a majority of the Court in the *Barden* case was written by Mr. Justice Field. He was also the author of the opinions of the Court in the case of *Deffeback vs. Hawke* and in *Davis's Administrator vs. Weibbold*, a fact to which he himself calls attention in the *Barden* case. He does not overrule the former decisions, but distinguishes them.

The *Barden* decision related to a railroad grant, of which the Court says:

"The tract granted covered a belt believed to be rich in minerals of gold and silver, and the United States were at the time engaged in a terrific conflict for the preservation of the Union, incurring an immense debt, exceeding two thousand millions, and many of their citizens engaged in the struggle looked forward hopefully and confidently to this source of relief to the burdened treasury. And we cannot with reason suppose that, under these circumstances, the United States intended that the control of this source of wealth and relief should be taken from them. It passes belief that they could have deliberately designed, in this hour of sore distress and fearful pressure upon their finances, to give away to a corporation of their own creation not only an imperial domain in land, but the boundless wealth that might lie buried in the mineral regions covered by 80,000 square miles." (*Ib.*, 318.)

The Court, in the very beginning of the dis-

cussion, calls attention to a prohibitory Act of Congress relating to grants in aid of railroads, in these words:

"That no act passed at the first session of the Thirty-eighth Congress [that being of the year 1864], granting lands to *states* or *corporations* to aid in the construction of roads or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which, in all cases, shall be and are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant. (13 Stat., 567.)" (*Ib.*, 312.)

This prohibitory statute is the foundation of the argument of the Court in the *Barden* case. The Court says, on page 318:

"Patents issued after an examination and determination of the fact by the Government whether portions of the land embraced in such grants did or did not contain other minerals, have been held as conclusive in subsequent controversies. Of this we shall speak more fully hereafter; but grants in *aid of railroads* (and we speak of *no other grants*) before such determination and issue of a patent, have never been held to pass other minerals than iron or coal, and it is only with other minerals, and with lands containing them, that we are concerned in this case."

Speaking of the case of *Deffeback vs. Hawke*, the Court says, in the *Barden* case:

"This was not a case arising upon a grant like the one under consideration at present." (*Ib.*, 323.)

And referring to the case of *Davis's Administrator vs. Weibbold*, the Court says:

"The effect given to the townsite patent will be found not inconsistent with the views hereafter expressed in the present case." (*Ib.*, 324.)

We have already quoted from the majority opinion in the case of *Barden vs. Northern Pacific R. R. Co.*, to show that the Court adopts, in very emphatic language, the doctrine, that when the Interior Department *and its subordinate officers* acting under its direction have determined the character of the land, that determination is conclusive:

"That the decision, unless set aside and annulled by direct proceedings, estops the Government from contending to the contrary, and * * in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

We have already argued, as we think, conclusively, that under the circumstances of this case, and in view of the terms of the granting act and of the proceedings thereunder, the decision as to the character of the land was made and the title passed, at the time of the final approval of the survey, with the same effect as if a patent had on that day been issued. If so, then the majority opinion in the case of *Barden vs. Northern Pacific R. R. Co.*, instead of being an argument against our position, becomes an authority of very great weight in our favor.

We confidently assert that the views expressed by Mr. Justice Field in reference to the Northern Pacific Grant are of such a character, in view of his former decisions, which he does not overrule, that they do not to any extent militate against, but, on the contrary, do sustain, our contention in this case, that the heirs of Baca received the title of the Government to all of the lands included within the boundaries of their approved survey, and that a subsequent discovery of mineral in any portion

thereof will not in the slightest degree invalidate the grant.

When we consider the matter in connection with the investigation and determination as to the character of the land, before the final authority given by the Commissioner of the General Land Office to the Surveyor General to approve this survey, the argument becomes overwhelming, even upon the case of *Barden vs. Northern Pacific R. R. Co.*, that the title did pass, as to this grant, in 1864.

It is very apparent that the statue of June 21, 1860, should be read as if the words "not known to be mineral at the date of final location" had been inserted in the act itself, as such is the interpretation which is given to the Act, and all similar Acts, from the earliest time. When the Act is thus interpreted, then the question comes, what effect is to be given to the words used by the Commissioner of the General Land Office, in his letter of February 12, 1864, where, after speaking of the approval, he says: "You will add the special reservation stipulated by the statute—but not to embrace mineral land nor to interfere with any other vested rights, if such exist." (Printed record, page 10.)

Manifestly, the same rule of construction must be applied in construing the Commissioner's words as is used concerning the grant itself. If, in the interpretation of the grant, we insert the word "known," so the word "known" must be inserted in the direction of the Commissioner, and it would read "not to embrace *known* mineral lands, nor to interfere with any other vested rights, if such exist." We cannot give the one construction to the

granting Act and a different construction to the words of the Commissioner. Even if a patent had been issued under some authority of law, and the very words used by the Commissioner in his letter had been inserted in the patent, to wit, "but not to embrace mineral land, nor to interfere with any other vested rights, if such exist," the construction that would have to be placed upon these words in the patent would be to confine the limitation to lands known to be mineral at the time the patent issued; and for the very well established reason that the Commissioner could not make any limitations which the grant itself did not make.

This subject was very elaborately discussed by Judge Sawyer, in a decision which is approvingly cited by this Court, through Mr. Justice Field, in the case of *Davis's Administrator vs. Weibbold*, already frequently referred to. (139 U. S., 520.) In the case referred to, Judge Sawyer says:

"The Land Department, in this very case, as in cases of patents to pre-emptioners, homestead claimants, and other purchasers of public lands, have acted, and I think correctly, upon the idea that patents to lands not known to be mineral lands at the time the patents issued, carried the title to mines subsequently discovered in the lands, notwithstanding the reservation from sale of mineral lands, in the Acts of Congress. By the words 'mineral lands' must be understood lands known to be such, or which there is satisfactory reason to believe are such at the time of the grant or patent; and the United States Courts which have had occasion to act upon this subject, so far as I am aware, have adopted that idea. (*Pacific Coast M. and M. Co. vs. Spargo*, 8 Sawyer, 645.)

"There must be some point of time when the character of the land must be finally determined, and for the interest of all concerned there can be

no better point to determine this question than at the time of issuing the patent. * * * *

"If land which a party has actually occupied, possessed, and peaceably enjoyed for a long series of years, claiming title under a patent of the United States fifteen years old, can be entered upon and prospected for a mine, by any trespasser who chooses to do so, and, a mine being found, the mine can be located and taken out of the patent on the vague and uncertain exception in the patent in question, it can be done fifty or a hundred years hence, and the patent, instead of being a muniment of title upon which the patentee, or his grantees can rest in security, would be but a delusion and a snare. Congress could never have contemplated such a construction and execution of the acts in question."

Cowell vs. Lammers, 10 Sawyer, 257, 258.

Judge Sawyer, after discussing historically the subject of settlements of government lands and sales of such lands, says:

"Are the owners of all these lands, thus sold, to be for all time liable to have their possession, held under patents upon their face regularly issued, intruded upon by any trespasser who chooses to prospect his orchard, or vineyard, or pasture, for a mine, and, when the mine shall be found, have it taken from him by the intruder, under the claim that the patent is void upon the grounds insisted upon in this case, that the land was not sold, in the case of purchasers, or was not granted, in the case of the railroad company? If such be the case there is certainly a serious defect in the laws or in their execution. I am unable to discover or believe that such a position is sanctioned by the laws or by the decisions of the Supreme Court."

"*The exception of mineral lands from the grant in the Act of Congress is explicit.* There is no express authority—no provision at all—requiring or authorizing this exception to be repeated in the patent. The lands patentable under the grant, *and*

no others, are to be patented. If the exception in the patent is no broader in its significance than the statute, it *adds nothing to and takes nothing from the effect of the statute itself*, in this respect, or to the effect of the patent issued in pursuance of the statute. If it is broader than the statute, then it is absolutely unauthorized by law, and as to the part which goes beyond the statute, at least, is utterly void. A patent upon its face should either grant or not grant. It must be seen, from a construction of the language of the grant itself, whether anything is granted or not, and if anything be granted, what it is. There is no authority to issue a patent, which, in effect, says: If the lands herein described hereafter turn out to be agricultural lands, then I grant them, but if they turn out to be mineral lands then I do not grant them. Such a patent would be so uncertain that it would be impossible to determine from the face of the patent whether anything is granted or not. The most that can be said, then, is, that the clause of exception and exclusion in the patent in no way affects the rights of the parties given by the statute—in no way enlarges or restricts those rights—and the same force and effect must be given to the patent on a collateral attack, as would be given to it had the clause been omitted, as both classes of patents would depend upon, and be controlled by, the same or similar statutory provisions."

Cowell vs. Lammers, 10 Sawyer, 259, 260.

It seems to us that these words of the distinguished jurist apply with great force to the case at bar. If our construction of the granting act is correct, then no words which the Commissioner directed should be inserted in the approval can modify or limit the effect of the grant. If no broader than the statute, they add nothing to, and take nothing from, the effect of the statute itself. If broader than the statute, then they are wholly

unauthorized by law, and as to the part which goes beyond the statute, are utterly void.

It is very apparent, from the very language used by the Commissioner, that he did not intend to make a limitation which would depend upon future discoveries of mineral in the granted premises. As much as ten years before this time, his own predecessor in office had construed "mineral lands" as used in the Act of March 3, 1853, to mean "lands on which are situated *known* salines or mines." (See citation by Justice Brewer, already quoted.)

The Commissioner must have had in mind this construction and these words, and the language he himself uses, indicates that such was his idea. He says:

"But not to embrace mineral land, nor to interfere with any *other* vested rights, if such exist."

Why did he say "other" vested rights? The very word implies that the alternative expression involved some "vested rights," and our minds at once revert to the words of Justice Field, in the case of *Davis's Administrator vs. Weibbold*, where he says that Congress "only intended to preserve *existing rights* to known mines of gold, silver or copper, and to *known mining claims and possessions*."

By speaking of "mineral lands" and "other vested rights," is it not very clear that the Commissioner had in mind that, if there were then *known mining claims or possessions*, they with other rights acquired before the date of this location, would be reserved, and not pass by grant to the heirs of Baca? We respectfully submit, that not only the proper construction of the law, but the very words

of the Commissioner, indicate that he must have intended to convey only the idea that known mines were reserved. But, inasmuch as there were no *known mines* at that time, and there is not a scintilla of evidence that any of the land was known to be mineral, in 1864, then, manifestly, the entire grant passed to the heirs of Baca, and from them to their grantees.

Commissioner Williamson was, of course, familiar with the records, and with the practice of his department of the government. He was also familiar with the decisions of the Courts, and his views have been supported by the subsequent decisions of the Supreme Court of the United States. The whole subject is well summed up in his letter of March 21, 1879, relating to this particular grant, and we venture once more to quote from it, in concluding this branch of our discussion:

"After the selection of this tract, it was surveyed and located by the Surveyor General of Colorado, he having first determined that the land was vacant and non-mineral.

"The seventeenth section of the Act of Congress, approved February 28, 1861, gave the Surveyor General of Colorado the same authority concerning the location of this tract as was originally conferred on the Surveyor General of New Mexico.

"After the selection, but previous to the location, the Commissioner of the General Land Office instructed the Surveyor General of Colorado that as the statute did not authorize the issuing of a patent, the Act of June 21, 1860, and the plat approved by the *Surveyor General*, would constitute the evidence of title.

"There is no doubt that Government may convey and vest the legal title without issuing a patent *as effectually* as may be done by patent. * * *

"The Surveyor General was authorized by the act to locate only vacant, non-mineral land. Unless the contrary appeared it would be presumed from the act of locating that the Surveyor General determined the land was not mineral. But before locating, the Surveyor General had expressly found and certified that this land was not mineral.

"It is now alleged that the land is mineral; that the Surveyor General approved the plat of survey, 'subject to the conditions and provisions of Section 6 of the Act of Congress approved June 21, 1860,' and that therefore the grantees cannot hold the land under that act.

"The conditions and provisions of the Act of June 21, 1860, were, as respects this question, that the selection and location should be on land determined at the time of such location, when the title passed, to be non-mineral land.

"The Act did not intend that if at any subsequent time in the remote future, mineral land should be discovered, the title should be unsettled, or that the title should be the subject of controversy through all time, as often as any one might choose to allege its mineral character.

"The Surveyor General did not undertake, and had no power to impose conditions not in the Act.

"If, after fifteen years, the questions as to the mineral character of the land may be re-opened, why may it not be raised again after the lapse of any number of years? If the question may be re-opened as to the land granted under the provisions of the Act of June 21, 1860, why may it not as to land acquired under the homestead, pre-emption and other acts of Congress? Would such title ever be considered secure?

"The question as to the mineral or non-mineral character of this land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals." (Printed record, pages 12 and 13.)

The following additional authorities are worthy of investigation, in connection with the subjects discussed in this brief:

Wisconsin R. R. Co. vs. Price County, 133 U. S., 496, 506.

St. Paul & Pacific vs. Northern Pacific, 139 U. S., 1, 6.

Deseret Salt Co. vs. Tarpey, 142 U. S., 241, 249.

Bishop of Nesqually vs. Gibbon, 158 U. S., 155, 167.

Stoneroad vs. Stoneroad, 158 U. S. 240.

Russell vs. Maxwell Land Grant Co., 158 U. S., 253.

CONCLUSION.

The heirs of Baca and their grantees have been in possession of this grant for more than thirty years.

The grant is far removed from any of the producing mining sections of the State. It is on the *eastern* edge of the San Luis valley—a level tract of country larger in area than the State of Connecticut, and lying on the eastern side of the main range of the Rocky Mountains.

Its owners use it for agricultural and pastoral purposes. Its northeast corner extends into the Sangre de Cristo Mountains, where are found the only timber lands of the grant. Here, also, are the sources of the streams on which the grant must depend for water for its irrigable lands.

In the chase after gold, men are now trespassing on this grant; not because they know that gold in paying quantity exists there, but hoping and trying to find it. According to the view of the trial Court, they cannot be ejected unless the grant owners can affirmatively prove, as a fact existing *now*, after thirty years' possession, that the particu-

lar spot trespassed upon is *not* mineral in character. In the language of Judge Sawyer, this makes the grant of the Government, instead of a muniment of title, a delusion and a snare. It enables the defendant in this case, and, of course, hundreds of others, with equal right, to dig pits and sink shafts where they please on the grant, endangering the lives of cattle, horses and men; and to cut down timber; to shut off the owners of the grant even from the grazing on certain of the lands, and to divert the waters of the streams from irrigating ditches below, resulting in the destruction of crops.

Is it possible that this grant, made for a consideration, in exchange for an equivalent area elsewhere, is to be so construed that its owners are liable, for all time, to have their possession intruded upon by any trespasser who chooses to prospect their "orchard or vineyard, or pasture" for a mine; and if a mine shall be found, to have it taken from them by the intruder, on the theory that the Government grant, made more than thirty years before, did not convey land, in which the intruder may happen to find mineral?

We submit to the Court, that under the facts of this case, and the law applicable to it, such a construction cannot for a moment be tolerated; and we ask this Court, by its decision, to vindicate the grant of the Government, which, we contend, vested in the heirs of Luis Maria Baca all the lands included within the exterior bounds of their survey.

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No. 154.

Office Supreme Court, U. S.
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FEB 7 1898
JAMES H. McKENNEY
CLERK

Supp. Brf. of Wolcott & Vaile for P. E.

UNITED STATES OF AMERICA.

Filed Feb. 7, 1898.

IN

THE SUPREME COURT

QUINCY A. SHAW, *Plaintiff in Error.* vs. MURRAY M. KELLOGG, *Defendant in Error.*	No. 154. (16252)

SUPPLEMENTAL BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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UNITED STATES OF AMERICA.

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PRELIMINARY STATEMENT.

This cause was originally brought to this Court upon certificate from the Circuit Court of Appeals for the Eighth Circuit. Printed briefs were submitted upon both sides, and also in behalf of the Government of the United States, and the case was orally argued in December, 1897. At the conclusion of the oral argument an order was made, pursuant to an application made by the parties, that the entire record be certified to this Court, from the Circuit Court of Appeals, and that the

parties be permitted to file additional briefs, and that the case should be submitted upon briefs. Under that order this supplemental brief is herewith submitted.

We understand that the briefs and arguments heretofore filed will be considered by the Court, and that the purpose of the present brief is to supplement, so far as counsel desire, what may have been said in the former briefs, in view of the filing in this Court of a transcript of the complete record.

The references to the record, in our first brief heretofore filed, relate to the transcript of the certificate from the Circuit Court of Appeals. The references in this brief relate to the pages of the transcript of complete record, filed in this Court pursuant to the writ of *certiorari*.

Our original brief contains a general statement of the case, and of the issues involved, and contains the specification of errors. (See former brief, pp. 24–28.)

In the present brief we shall, therefore, confine ourselves to a discussion of certain facts, as developed in the complete record, together with certain further suggestions of law applicable thereto, but invoking the consideration by the Court of those matters fully presented in our former brief.

I.

Events in Chronological Order, Relating to the Title to Baca Grant No. 4.

June 21, 1860. Grant by Congress, to the heirs of Luis Maria Baca, of land equal in quantity to that claimed at Las Vegas. (Printed Record, p. 28.)

Dec. 8, 1860. Certificate as to the acreage of the claim at Las Vegas. (Printed Record, p. 30.)

Dec. 12, 1862. Selection of Grant No. 4 by the agent of the grantees. (Printed Record, p. 32.)

Feb. 5, 1863. Certificate, by Surveyor-General of New Mexico, of the selection of No. 4, and of its acreage. (Printed Record, pp. 31, 32.)

Oct. 3, 1863. Application by claimant of Grant for official survey thereof. (Printed Record, p. 34.)

Nov. 4, 1863. Survey of Grant completed. (Printed Record, pp. 39–51.)

Mar. 15, 1864. Survey and plat thereof approved by Surveyor-General. (Printed Record, p. 52.)

May 4, 1864. Acknowledgment of receipt of plat and map in General Land Office, at Washington, without objection. (Printed Record, p. 53.)

May 18, 1864. Conveyance by the heirs of Baca to John S. Watts. (Printed Record, pp. 53, 54, 58.)

Nov., 1877. Conveyance of the title held by Watts to William Gilpin, by decree of court, pursuant to a contract of date February 17, 1862. (Printed Record, pp. 60-65.)

Dec., 1885. Conveyance by William Gilpin to George H. Adams. (Printed Record, p. 67.)

March, 1887. Conveyance by George H. Adams to Quincy A. Shaw, plaintiff in error. (Printed Record, p. 70.)

II.

FACTS RELATING TO THE OCCUPANCY OF BACA GRANT NO. 4 BY ITS OWNERS.

Oct.-Nov., 1863. Survey of the Grant and establishment of monuments, at each half mile, on its exterior boundaries, except in the extreme mountainous portion, at the northeast corner. (Printed Record, pp. 41, 49, 111.)

1869. Stakes and monuments existed at every half mile, on ten miles of the north side, the entire west side, the entire south side, and nearly five miles of the east side of the square body of land. (Printed Record, p. 76.)

1869. The Grant actually occupied by the the owner thereof, by and through tenants and employees, and continuously from that date to the date of this suit (1893). (Printed Record, p. 76.)

1881. The entire Grant enclosed by a fence, on the north line, from the mountains, west to the northwest corner, thence south to the southwest corner, thence east to the southeast corner, and thence north, nearly five miles, on the east side, into the mountains. (Printed Record, p. 77.)

1881. This fence, with the aid of the mountains in the northeast corner, had the practical effect of making a complete enclosure; persons could not get on to the Grant without crossing the fence, except "by going over the range; a pretty hard trip to get over there; I do not think a man could get over with (*out*) a burro." (Printed Record, p. 85.)

1869-1893. The Grant has all this time been used for a cattle and hay ranch by its owners. (Printed Record, p. 79.)

1877-1893. At least $66,000 has been paid in local taxes, such taxes being paid on the entire Grant. (Printed Record, pp. 77, 85.)

III.

RIGHTS HERETOFORE ASSERTED TO THE POSSESSION OF THE "EASTERN STAR MINE," WITHIN THE BOUNDARIES OF BACA GRANT NO. 4.

April 24, 1876. Alleged discovery of mineral by Francois Herard et al. (Defendant's Answer, Printed Record, p. 8.)

June 16, 1876. Alleged making of location certificate by Francois Herard et al. (Defendant's Answer, Printed Record, p. 9.)

1877. The property abandoned by Herard, because on Baca Grant No. 4. (Printed Record, p. 81.)

1879. This property, leased by the owners of the Grant, to one William Young. (Printed Record, p. 83.)

1879. The property abandoned by lessee, Young. (Printed Record, p. 83.)

Jan. 24, 1883. The property leased, by the owner of the Grant, to a mining company. (Printed Record, pp. 68, 71.)

1885. This property abandoned by the lessee. (Printed Record, pp. 73, 80.)

1887. Verbal lease, by the manager of the Grant, to the defendant in error, Murray M. Kellogg. (Printed Record, p. 74.)

1888. The manager of the Grant refuses a second lease to the defendant in error, Kellogg. (Printed Record, p. 75.)

1890. Invasion of the premises by defendant in error, Kellogg, and ouster of plaintiff. (Verified complaint, Printed Record, p. 2. Testimony of Adams, p. 75.)

IV.

As to the Mineral or Non-Mineral Character of the Land in Controversy.

Dec. 12, 1862. Statement of the original locator of Baca Grant No. 4, that the land is "not mineral." (Printed Record, p. 32.)

Feb. 24, 1863. Surveyor General Case attributes to Gov. Gilpin the *opinion* that the Grant "*would cover* rich minerals *in the mountains*." (Printed Record, p. 33.)

Nov. 28, 1863. Surveyor Sheldon, in surveying the Grant, and examining the same, for purpose of reporting as to the character of lands therein, "saw no indications of the precious metals." (Printed Record, p. 50.)

Dec. 5, 1863. Certificate of Surveyor General Pierce, that the land covered by the Grant "is not mineral." (Printed Record, p. 35.)

Dec. 5, 1863. Certificate by Register and Receiver, that the land covered by Baca Grant No. 4 "is not mineral." (Printed Record, p. 36.)

Dec. 12, 1863. Surveyor-General Pierce shows that numerous miners had prospected this land, and had found no gold. (Printed Record, p. 36.)

Feb. 12, 1864. The Commissioner of the General Land Office, after having refused to permit approval of the selection or survey until satisfied that the land was not mineral, does, after receiving all the evidence called for, authorize approval of the survey. (Printed Record, p. 38.)

Mar. 15, 1864. The Surveyor-General, who is specifically designated by the statute to make the location and survey, and who is authorized by the Act to locate only non-mineral land, does, after investigation, approve the survey and plat. (Printed Record, p. 52 and Plat.)

1876. Alleged discovery of mineral on specific land in controversy, within the exterior boundaries of the Grant. (Defendant's Answer, Printed Record, p. 8.)

1877. This property abandoned by the mineral locator. (Printed Record, p. 81.)

1879. A lessee, holding this property under the owners of the Grant, abandons his lease. (Printed Record, p. 83.)

1885. A subsequent lessee, holding under the owners of the Grant, abandons the leased property. (Printed Record, p. 73.

1886–1887. The present defendant in error, being a lessee under the owners of the Grant, abandoned the property, because, as the lessee understood, he "could not make it pay." (Printed Record, p. 82.)

1890. Defendant in error takes possession of the land in controversy, and holds adversely to his former landlord.

1893. (Beginning of this suit.) Plaintiff in error admits this land to be now known to be mineral in character. (Complaint, Printed Record, p. 2.)

V.

Facts Showing that the Land Department Adjudicated, in 1864, the Question as to the Character of the Land Covered by Baca Grant No. 4.

June 21, 1860. The heirs of Baca were authorized to select, and the U. S. Surveyor-General was authorized to survey and locate, only "vacant land, not mineral;" and this was to be taken in square bodies, each to contain not less than one-fifth of the acreage claimed at Las Vegas, and the selection was to be completed within three years. (Act of Congress, 6th section; Printed Record, p. 28.)

Dec. 8, 1860. The acreage of the claim at Las Vegas was certified to be 496,446.96; thereby showing that the amount to be taken in any single tract, and in a square body, would be 99,289.39 acres. (Printed Record, pp. 30, 32.)

Dec. 12, 1862. The representative of the grantees selects Baca Grant No. 4, and alleges that it is *not mineral*. (Printed Record, p. 32.)

Feb. 24, 1863. The Surveyor-General of Colorado presents facts calculated to raise a suspicion that some of the land *may* be mineral. An issue on this subject is thereby distinctly raised. (Printed Record, p. 33.)

Mar. 13, 1863. The Commissioner of the General Land Office calls the attention of the new Surveyor-General of Colorado to the remark attributed to Gov. Gilpin, and thereupon makes the following requirements:

1. That the application to survey cannot be approved until evidence is furnished that the land is "not mineral." (Printed Record, p. 33.)

2. The character of evidence is designated, to wit: (1) The official certificate of the Surveyor-General to be given "whenever *you* [the Surveyor-General] shall acquire good and satisfactory information that the lands included in the selection are vacant and are not mineral." (2) The certificate of the Register and Receiver to the same effect.

The necessary deductions from this letter are: *First.*—That the Commissioner considered that the law required, not that the land should be taken with a reservation of minerals, but that the selection and survey should include only such lands as were "not mineral." *Second.*—That the mineral or non-mineral character of the lands "included in this selection" should be determined before approval of survey. *Third.*—That the evidence designated by him, if it was to the effect that the land was not mineral, would justify approval of the selection, and its survey.

Nov. 2, 1863. Approval of the contract for survey was refused, by the Commissioner, because there had been no compliance with his requirements of March 13. (Printed Record, p. 35.)

This letter plainly means that the non-mineral character of the lands, included in the selection, must be shown, before the Government will approve the selection or authorize its survey.

Dec. 12, 1863. The Surveyor-General transmitted to the Commissioner his own certificate that the lands were not mineral, but no certificate from the Register and Receiver was sent. (Printed Record, pp. 36–37.)

Jan. 16, 1864. The Commissioner writes: "The evidence furnished by you is not sufficient, in the opinion of this office, to prove that the selection, No. 4, does not cover valuable mineral deposits." "The approval of the selection will *stand suspended* until *some satisfactory proof* is obtained upon the points indicated." (Printed Record, pp. 37–38.)

The necessary inference from this letter is, that approval will be withheld *until* the Commissioner is satisfied, by evidence, of the character designated, that, as a present fact, the selection does not include mineral lands.

Neither this letter, nor any prior letter from the Commissioner, will

Jan. 16, 1864. permit the conclusion that the Commissioner considered that, under the law, he could authorize an approval of a selection which *did* include mineral lands, nor that he could satisfy the requirement of the statute by a reservation of the part which should thereafter be found to be mineral; but, on the contrary, he was constantly insisting that the lands included in the selection should affirmatively appear to be not mineral.

Feb. 1864. After January sixteenth, and before February 12, 1864, Governor Gilpin must have personaliy appeared before the Commissioner with further evidence, for on February twenty-sixth the Commissioner, "at the request of William Gilpin, Esq.," transmits certain documents to the Surveyor-General, and says: "These papers were deposited in this office by Mr. Gilpin." These papers included documents in the nature of evidence as to the non-mineral character of the land, to wit:

1. The certificate of the Register and Receiver, which had not been received on January sixteenth, and the absence of which was then one ground for suspending approval.

2. The field notes of the Sheldon survey, which had never before been submitted to the Commissioner.

These field notes show that the surveyor had carefully traversed the

Feb., 1864. country in the vicinity of the initial point, as he had to ascertain, by original observations, the point where the thirty-eighth parallel of latitude crossed the base of the range. From this point he had gone eastward into the mountains, until further progress was impossible: "The mountain in front of us is utterly impracticable. In our immediate presence is a precipitous wall of granite; and from this point to its crest there is a succession of such, only higher and more difficult."

These field notes also show that the surveyor, after tracing the boundary to the northwest corner and thence to the southwest corner, and thence to the southeast corner of the Grant; went north on the east line into the mountains, to a point nearly five miles north of the southeast corner, ascending a steep mountain to the "summit of ridge, 1,000 feet above the plain." "From this point to the northeast corner of the Grant the mountains are very rugged, precipitous and covered with snow." (Printed Record, p. 49.)

The "general description" given by the surveyor, shows that he made a careful examination of the land within the Grant, containing, in round figures, 100,000 acres. He classifies all this land; the result of his classification (converting square miles into acres) being as follows:

Feb., 1864. "1st rate" land, 40,000 acres. "Good grazing land," 49,760 acres; "extreme mountain portion," 6,400 acres; "sand hills," 3,840 acres. (Printed Record, p. 50.)

These field notes affirmatively show that the surveyor examined the interior of the Grant, and not merely its exterior boundaries. "The Chatillon leaves the mountains at a point nearly equidistant between the north and south boundary lines." "The general course of the mountains is N. 32° west, and in the vicinity of the 'Trois Tetons' and the Chatillon Creeks, their elevation above the park is 6,300 feet."

"The mountains" are composed "mainly of a dense and fine-grained granite, varying to syenite and gneiss." "Near their base is found a very compact conglomerate."

"The creeks are timbered about five miles. There is considerable good pine near the base of the mountains, and firs higher up." (Printed Record, p. 50.)

This surveyor was a deputy under the Surveyor-General, and made the survey as an official survey; and he and his assistants subscribed the official oath.

The defendant in error claims that Mr. Sheldon's survey was a private survey; and counsel for the Government speak of Mr. Sheldon "as a mere employee of Gilpin." The

Feb., 1864. record shows exactly the contrary. The survey was made under the authority of the Surveyor-General, and under instructions given by him. (Printed Record, p. 34.) It was made under oath. (Printed Record, p. 51.) Its approval was authorized by the Commissioner. (Printed Record, p. 38.) It was officially approved by the Surveyor-General. (Printed Record, p. 52.) "The survey was made under the usual guaranties of its accuracy; and the field notes returned to this office for approval under instructions from the General Land Office, dated February 12, 1864." (See official report Surveyor General, included in report of Secretary of Interior, 1864. Printed Record, p. 87.)

This surveyor, having thus carefully and officially examined the land, says:

"Saw no indications of the precious metals or minerals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle shown in the notes." Printed Record, p. 50.)

3. The plat of this survey was one of the papers so submitted to the Commissioner, and which he had not seen on January 16.

This plat showed that only a small portion of the Grant was occupied by the mountains, and that on the slopes of these mountains

Feb., 1864. was found the only timber within the Grant; and that in these mountains was the source of water supply for irrigation of the level lands below. (See plat, Printed Record, p. 52.)

On February 12, 1864, we may justly conclude that the Commissioner had received all the evidence that he had specifically called for, to wit: (1) The Surveyor-General's certificate. (2) The certificate of the Register and Receiver; that he had also supplementary evidence fully covering the requirements of the last clause in his letter of January 16, for he had (3) the plat, field notes, description and statement of a sworn surveyor, who had recently made a detailed examination of the ground. (4) We may also justly conclude that Gov. Gilpin, himself, was examined by the Commissioner, touching the "opinion" attributed to him by Surveyor-General Case. Under the circumstances, theretofore developed, it is unreasonable to suppose that the Commissioner would let Gov. Gilpin escape from his office without examination on this point.

Feb. 12, 1864. The Commissioner of the General Land Office authorizes the Surveyor-General to approve the survey. In doing this the Commissioner said: "The statute does not authorize the

Feb. 12, 1864. issue of a patent. The aforesaid law of twenty-first June, 1860, with your plat, approved in the manner indicated, will, therefore, constitute the evidence of title." (Printed Record, p. 39.)

The necessary deductions from this letter are: (1) That in the opinion, and according to the intent of the Commissioner, the approval by the Surveyor-General would be the final act on the part of the Government, in transferring the title. (2) That if the law had provided therefor, the grantees would then be entitled to receive a patent; but, the law not providing for this evidence of title, its place would be effectually supplied by the granting Act, and the approved plat.

But it is contended that the approval was had with a reservation—"not to embrace mineral land, nor to interfere with any other vested rights, if such exist."

That the Commissioner did not intend by this expression to say that the title would pass, with a *reservation* of such land as should, in the remote *future*, be found to contain mineral, although then supposed to be non-mineral, is conclusively shown by divers circumstances, among which may be mentioned the following:

1. The expression of the Commissioner is fully satisfied by con-

Feb. 12, 1864. fining it to *then known* mining claims, or possessions, if such should be found to exist.

2. That he intended to so confine the expression used by him is apparent by his words, "any other vested rights." There could be no *vested* mineral right in land not then *known* to be mineral. The word "other," by the inexorable rules of language, must carry the idea of "vested rights" back to the mineral land referred to in the same sentence.

3. The Commissioner attributes to the *statute* the "special reservation" which he intends to designate. He does not purport to add any requirement not contemplated by the statute. If the statute makes no such reservation of future discoveries of mineral, then the Commissioner makes none.

4. The Commissioner had no power to impose conditions not in the Act. Any attempt to do so would be *ultra vires*. The Commissioner was not the grantor of the lands; the law must speak for itself.

5. The law making the Grant did not authorize a reservation of lands which might thereafter be found to contain mineral. This contention will be argued in discussing further the law of the case; but the following suggestions may be made here:

(1) The Act does not, in terms, make a reservation from the title

. 12, 1864. to be granted, or make that title subject to forfeiture on account of subsequently disclosed conditions.

(2) It is a grant, as a present fact, of "vacant land, not mineral."

(3) The right of selection was limited to three years. This time was clearly allowed for the purpose of enabling the grantees to find, on the designated portion of the public domain, vacant land, of the character named in the act, and manifestly contemplated that the facts developed within that period of time would show whether the land selected was or was not of the permitted character. The only rational construction of the intent of Congress is that, upon the facts disclosed within the allotted three years, the character of the land should be determined, and if *then* found to be vacant and not mineral, that the title should pass to the grantees.

(4) The statute specifically designated an officer of the Government, to wit: the Surveyor-General, to "make survey and location" of the lands selected. The use of these words, taken in this connection, must mean that the Surveyor-General was not only to officially determine the boundaries of the land, but to confine the selection to the character of land authorized to be taken. His official approval, there-

Feb. 12, 1864. fore, must amount to a decision that the land by him surveyed and located is of the character designated by the statute.

6. To say that the Commissioner intended that the title should pass, subject to forfeiture, to the extent that any of it should thereafter be found to be mineral in character, is to say that no ascertainment or certificate of the then character of the land was at all necessary. If the grantees would in no event obtain title to land then supposed to be non-mineral, but years afterward discovered to contain mineral, then all immediate examination was superfluous. But no such construction can be logically attributed, either to the law itself or to the acts of the Commissioner.

7. The communications of the Commissioner, from July 26, 1860, to January 16, 1864, inclusive, peremptorily insisted upon evidence of the then non-mineral character of the lands covered by the selection. When, on February 12, 1864, he authorizes approval, he thereby says that the evidence furnished has satisfied his mind upon this subject; and by that act he necessarily adjudges the lands selected, surveyed and located, with the necessary acreage, to be of the character prescribed by the Act of Congress.

March, 1864. The plat and survey were, under the authority of the commissioner, approved by the Surveyor-General. The approval of the field notes contains no limitations. The approval of the plat is, "subject to the conditions and provisions of Section 6 of the Act of Congress, approved June 21, 1860."

May 14, 1864. The Commissioner of the General Land Office acknowledged the receipt of the transcript and field notes, and made no objection thereto; and the title evidenced by the Statute and the approved plat has stood unassailed for more than thirty years.

VI.

Adjudication in the Land Office, That the Title to Baca Grant No. 4 Had Passed from the Government and Vested in Private Individuals.

In 1879 the owner of the Grant solicited the issuance of a patent, as evidence of his title. (Printed Record, p. 100.)

Opposition to the issuance of the patent was made, on the ground that the land was then (1879) mineral in character. (Printed Record, p. 101. See also "Baca Float No. 3," 5 Land Decisions, 706, 707.)

The Commissioner of the General Land Office, upon this issue being raised, expressly decided as follows:

"The question as to the mineral or non-mineral character of this land has been passed upon by competent authority. The title has passed from

the Government, and vested in private individuals. This office has no authority to reopen the question. The land cannot longer be regarded as a part of the public domain." (Printed Record, p. 101.)

A subsequent Commissioner reiterated this conclusion:

"You will see by the foregoing, that the land in question was determined in 1864, by the Surveyor-General, whose province and duty it was, to be non-mineral. The location was then perfected, and the title passed." (Printed Record, p. 103; also Printed Record, p. 104.)

VII.

Recognition by the Government, Subsequent to May 4, 1864, That the Title Had Vested in the Grantees.

December, 1864. Report of the Secretary of the Interior, accompanying the annual message of the President to Congress:

"In Colorado Territory, the returns of surveys for the last fiscal year, consist of correction, parallel, township and sectional lines, with fifty miles of private grant, embracing over 431,000 acres of public lands; also 92,292 [?] acres in the fourth location of the Las Vegas Grant, as confirmed by Act of twenty-first of June, 1860, to the heirs of Luis Maria Baca, the premises formerly falling within the limits of New Mexico, but now of Colorado." (Printed Record, p. 87.)

December, 1864. From the report of the Surveyor-General, included in the report of the Secretary of the Interior to Congress:

"During the month of November, 1863, Deputy Surveyor A. Z. Sheldon made a survey of Grant No. 4 of the heirs of Luis Maria Baca, as located

by William Gilpin, attorney for said heirs, under the Act of June 21, 1860. The survey was made under the usual guarantees of its accuracy; and the field notes returned to this office for approval, under instructions from the General Land Office, dated February 12, 1864. That survey *and location* were approved, subject to the conditions and restrictions above referred to." (Printed Record, p. 87.)

Public map issued by the General Land Office in 1864, and accompanying the report of the Secretary of the Interior, showing Baca Grant No. 4 segregated from the public domain. (Original Exhibit No. 22½.)

Certified copy of Government map of date of October 2, 1866, showing Baca Grant No. 4 segregated from the public domain. (Original Exhibit No. 23.)

From the report of the Commissioner of the General Land Office, for the year 1866, at page 104 thereof:

"A small settlement has recently been made near the lake, on Baca Float No. 4, *belonging to Governor Gilpin.*" (Printed Record, p. 88.)

Official map of date of November 5, 1868, showing the segregation of Baca Grant No. 4 from the public domain. (Original Exhibit No. 25.)

August 26, 1867. The Commissioner of the General Land Office issued a certified copy of the map of Baca Grant No. 4, from his office.

January 14, 1868. The Commissioner, in response to another application for patent, stated that the survey and statute are the only authorized evidences of title, but that a grant may be made by law, as well as by a patent pursuant to a law, and that a confirmation by a law is as fully, to all

intents and purposes, a grant as if it contained, in terms, a grant *de novo*. (Printed Record, p. 90.)

May 4, 1868. Joseph S. Wilson, Commissioner, by letter transmitted copies from his office of papers relating to this title, speaking of Claim No. 4 of the heirs of Luis Maria Baca as "confirmed to them under the Act of Congress approved June 21, 1860." (Printed Record, p. 91.)

In the official report of the Commissioner of the General Land Office for 1869, at page 170, it was stated:

"The heirs of Luis Maria Cabeza de Baca, by the Act of June 21, 1860, *were granted*, in lieu of 'Las Vegas Grandes,' which they claimed, the same amount of land contained in the Las Vegas town grant, to be located by them in square bodies, not exceeding five in number. The heirs of Baca have located said Grant, in five square bodies, viz: Nos. 1 and 2, in New Mexico; Nos. 3 and 5 in Arizona, *and No. 4 in Colorado*." (Printed Record, p. 93.)

It was stipulated by counsel, upon the trial, that the Government Map of the United States, printed with the report of the General Land Office for the year 1869, shows the segregation of Baca Grant No. 4 from the public domain; also, that a like map, printed with a like report for the year 1876, shows said Grant segregated from the public domain, and its relation to public surveys. (Printed Record, p. 94.)

March 21, 1879, Commissioner J. A. Williamson declares the title to have passed from the Government to private individuals. (Printed Record, p. 100.)

June 28, 1884. Commissioner N. C. McFarland declares that the location had been perfected, and that the title had passed. (Printed Record, p. 103.)

June 18, 1889. Acting Commissioner W. M. Stone stated that the case had become final, so far as his office was concerned; and quoted from previous decisions to the effect that the title had passed. (Printed Record, p. 104.)

It was stipulated by counsel at the trial, that the Baca Grant had been marked continuously, up to date of the trial, upon the official maps issued by the Land Department of the United States. (Printed Record, p. 143.)

QUESTIONS OF LAW.

The legal rights of the parties, as determined by the statute, and by adjudications of this Court, under similar grants, have been very fully discussed in our original brief, to which we again invoke the attention of the Court; but under the permission of the Court, heretofore granted, we venture to make some supplementary suggestions.

IX.

What Is the Proper Construction of the Sixth Section of the Act of Congress of June 21, 1860, In Its Use of the Words "Vacant Lands Not Mineral?"

Our contention is, that it was the manifest intention of Congress that the question of the mineral or non-mineral character of the land selected, as affecting the validity of the selection, should be determined within the three years allowed by the statute for selection, and that the question would be closed upon approval of survey and location by the Surveyor-General.

It is certainly clear that it was the intention of Congress to give to the heirs of Baca a certain number of acres of land, exactly equivalent in area to the lands they had claimed at Las Vegas. The designation of the character of the lands they were to select, the territorial limits within which it was to be situated, and the time allotted for the selection, all show that the Grant was intended to be an absolute appropriation from the public domain, to be immediately made, and rendered specific by survey. It is unreasonable to suppose that Congress intended that an honest and good-faith selection of apparently non-mineral lands, made within the three years, and surveyed and located by the Surveyor-General, should be defeated, years subsequently, by the discovery that hidden beneath the surface of the earth, there was, in fact, mineral.

If it had been the intention of Congress to grant a specific piece of territory, with a reservation of that portion thereof which should subsequently prove to be mineral in character, it would have been a simple thing, by apt language, to have expressed that idea; to have specifically stated that any selection, survey or location, should not pass title to any land subsequently found to be mineral, but that mineral deposits should, through all the future, be reserved.

The only limitation upon the Grant, however, is that the premises selected shall be vacant lands not mineral. It must have been known by Congress that the area claimed was a large one, from the papers then submitted to it; and when the Act provided that the whole amount should be distributed in not more than five tracts, thereby requiring one-fifth of the whole to be in one body, and when the Act required that each tract selected

should be in square form, certainly the reasonable conclusion is that Congress did not intend to be scrupulously precise as to whether some small fragment of the land selected, within the square body, should, at some subsequent period, be found to contain mineral deposits. Congress certainly intended to grant to the heirs of Baca the full acreage designated, to be taken in the form specified.

Counsel for the defendant in error has called attention to a discussion by this Court in the case of *Mining Co. vs. Consolidated Mining Co.*, 102 U. S., 167, as to the policy of Congress in reserving mineral lands. That discussion, however, as also a like discussion in the case of *Deffeback vs. Hawke*, 115 U. S., 400, discloses the fact that Acts of Congress, previous to the one now under consideration, had been quite specific in designating reservations on account of minerals; as, for example, the Pre-emption Act of 1841 (*5 Stats., 453*), which excepted from pre-emption and sale "lands on which are situated *any known salines or mines*"; while other acts prohibited the *survey* of lands containing mineral. Thus this Court, in the case first cited, speaks of the uniform reservation of mineral lands from *survey*, as well as from sale and pre-emption; and the Court adds:

"It follows, from the finding of the Court and the undisputed facts of the case, that the land in controversy, being mineral land *and well known to be so when the surveys of it were made*, did not pass to the state under the school section grant." (*Ibid.*, 175.)

The quotation we made in our original brief from the case of *Deffeback vs. Hawke*, 115 U. S., 405, follows a general discussion by this Court, through

Mr. Justice Field, of the policy of Congress in its reservation of mineral lands; and yet in that case the Court is very careful to confine such statutory limitations to lands *known at the time* to be valuable for minerals.

When we find this Court saying, in reference to such statutory limitations: "A change in the conditions, occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title, as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale." (*Colorado Coal Co. vs. United States*, 123 U. S., 328;) and again, in speaking of lodes and placers; saying: "The *subsequent* discovery of lodes upon the ground, and their successful working, does not affect the good faith of the application; that must be determined by what was known to exist at the time." (*United States vs. Iron Silver Mining Co.*, 128 U. S., 683;) and when again, we find this Court, in construing provisions as to townsites with a specific reservation as to minerals, saying, as to such statutory provisions: "They are to be read in connection with the clause protecting existing rights to mineral veins; and with the qualification *uniformly accompanying* exceptions in Acts of Congress of mineral lands from grant or sale. Thus read, they must be held, we think, merely to prohibit the passage of title under the provisions of townsite laws to mines of gold, silver, cinnabar or copper, *which are known to exist*, on the issue of the townsite patent, and to mining claims and mining possessions in respect to which such proceedings have been taken under the law or the custom of miners, as to render them valid, creating a property

right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth"—(*Davis's Adm'r. vs. Weibbold*, 139 U. S. 518), there seems to be no room for debate as to the proper construction of this statute.

Under these decisions, this statute, passed in 1860, specifically designating an officer of the Government who, on behalf of the Government, was to make survey and location of the lands selected, must be held, in speaking of the character of the land to be selected, surveyed and located, to have reference to the character of land as then known, prior to the final act of appropriation.

We respectfully insist that, whether this Act be construed by itself, under an application of those reasonable rules of construction, by which the true intent of Congress is to be ascertained, or whether we resort to judicial decisions, heretofore made and permitted long to stand in this Court, as to the construction of similar acts, we are bound to come to the conclusion that Congress did not intend to keep open, for all time, the question as to the character of the lands selected and located, but that it contemplated that the title to the lands, as surveyed, should pass when that survey was officially approved.

X.

The Grant Made to the Heirs of Luis Maria Baca, by the Act of Congress, Was a Grant in Præsenti, Which Became Specific and Absolute Upon the Approval of the Official Survey Thereof.

It is to be observed that the original counsel for the defendant in error, in his brief, at page 25,

directly admits that this grant, in its nature, is of the character here stated. Speaking of the case of *Rutherford vs. Greene's Heirs*, he says:

"The act making the grant in that case, *as in this*, was a grant *in præsenti*, and only required an identification and segregation of the land to vest the title; but the vital difference is, that in this case the grant was not applicable to all lands, and could not be located upon mineral land."

The brief purporting to be filed on behalf of the Government takes the opposite position, and, at page 6, contends that this was not a grant *in præsenti*.

The case of *Rutherford vs. Greene's Heirs*, 2 Wheat., 196, cited by us in our original brief, and which has for many years been a leading case in this Court, seems to us conclusive in favor of our contention.

Counsel for the Government attack that case, and sum up the discussion by claiming that the decision of this Court, rendered in that cause, was merely to the effect that the rights granted by the statute "became perfect by the grant which issued under the Act of 1784."

This Court distinctly held in that case, Chief Justice Marshall announcing the opinion, that the *legislative* act "vested a title" in General Greene, for the land mentioned, and that the *survey* "gave precision to that title, and attached it to the land surveyed." (*Ibid*, pp. 205 and 206.)

This Court, in a subsequent case, thus comments on the case of *Rutherford vs. Greene's Heirs:*

"The state of North Carolina, in 1780, passed an act reserving a certain tract of country to be appropriated to its officers and soldiers; and in 1782, after granting 640 acres in the territory reserved to each family that had previously settled on it,

and appointing commissioners to lay off, in one or more tracts, the land allotted to the officers and soldiers, proceeded to enact that 25,000 acres of land should be allotted for and given to Major General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense the state entertained of the extraordinary services of that brave and gallant officer.

"In pursuance of this law, the commissioners allotted 25,000 acres of land to General Greene, and caused the tract to be surveyed and returned to the proper officer. The manner in which the title originated under which Rutherford claimed, is not very clearly stated in the case. The decision turned altogether on the validity of the title of General Greene, and the date at which it commenced. And the Court said that the general gift of 25,000 acres lying in the territory reserved, became, *by the survey*, a particular gift of the 25,000 acres contained in the survey. And, after examining the title very fully, the Court, in conclusion, say: 'It is clearly and unanimously the opinion of the Court, that the Act of 1782 vested a title in General Greene to 25,000 acres of land, to be laid off within the boundaries allotted to the officers and soldiers, and that the survey made in pursuance of that act, and returned March 3, 1783, gave precision to that title and attached it to the land surveyed.'

"There was a further objection taken to the title of General Greene, upon the ground that, by the Constitution of North Carolina, there should be a seal of the state to be kept by the governor and affixed to all grants. And it was objected that this grant by the Legislature had not the formality required by the Constitution to pass the estate. But in answer to this the Court said that this provision was intended for the completion and authentication of an instrument attesting a title previously created by law. That it was merely the evidence of prior legal appropriation, and not the act of the original appropriation itself."

Fremont vs. United States, 17 How., 559.

This Court, later, speaking through Mr. Justice Field, made similar comment upon the case of *Rutherford vs. Greene's Heirs*, adopting it fully; and this Court is quoted as saying:

"It recognizes, as a general principle of justice and municipal law, that such a grant for a certain quantity of land by the Government, to be afterwards surveyed and laid off within a certain territory, vests in the grantee *a present and immediate interest*."

Hornsby vs. United States, 10 Wall., 234.

See, also,

Schulenberg vs. Harriman, 21 Wall., 60.

It will be observed that the words, "are hereby granted," are not used in the grant construed in *Rutherford vs. Greene's Heirs*; nor does the legislative act contain any words of present grant. The words were "*shall be* allotted for and given to;" and Chief Justice Marshall says:

"It has been said, that to make this an operative gift, the words 'are hereby' should have been inserted before the word 'given;' so as to read, 'shall be allotted for and are hereby given to,' etc. Were it even true that these words would make the gift more explicit, which is not admitted, it surely cannot be necessary now to say, that the validity of a legislative act depends, in no degree, on its containing the technical terms usual in a conveyance. Nothing can be more apparent, than the intention of the Legislature, to order their commissioners to make the allotment, and to give the land, when allotted, to General Greene."

2 Wheat., 198.

Counsel for the Government, however, urges that Baca Grant No. 4 was "indemnity" land, and, therefore, subject to those principles which have

been announced in reference to "lieu" or "indemnity" lands, in railroad grants, under certain statutes.

It seems to us that very little argument is needed to show that there is no similarity between this Grant and the railroad grants referred to. The only sense in which the Baca Grants were "indemnity" lands was that they were given in consideration for an equivalent acreage, to which these grantees had asserted title, under the treaty of Guadalupe Hidalgo, at Las Vegas. But the Grant is an affirmative grant of a specific amount of land, to be taken in a square form, within a certain limited territory, and a particular officer of the Government is designated to survey and locate it. No other provision is made for official action, the survey and location by the Surveyor-General being the only designated Governmental action in the premises.

Counsel calls attention to decisions of this Court concerning an act granting lands to aid in the construction of certain railroads in the state of Wisconsin. (13 *Stats.*, 66.) But, in that act, and in other acts of like character, there was a specific provision that the "indemnity" lands selected should be subject to the *approval* of the *Secretary of the Interior*, the language being:

"But, in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved or otherwise disposed of, any sections, or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful for any agent or agents, to be appointed by said company, to select, *subject to the approval of the Secretary of the Interior*, from the public lands of the United States, nearest to the tier of sections above specified, as much land, in alternate sections or

parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, etc." (See Section 1.)

That act, also, in its 7th Section, expressly provided for the ultimate issuance of patent, after all the terms and conditions of the statute had been complied with.

The Northern Pacific Grant (13 *Stats.*, 365), provided, also, in its 3d Section, that the "lieu" or "indemnity" lands should be selected by the company, under the *direction* of the *Secretary of the Interior*, and that statute also provided that, after the performance of certain conditions, the patent of the United States should issue, as evidence of the transfer of title. (See Section 4.)

So, also, the act relating to the Atlantic & Pacific Road (14 *Stats.*, 292, 295), provided in like manner that the "indemnity" lands "shall be selected by said Company, * * * under the *direction* of the *Secretary of the Interior*." (Section 3.) And by that statute also, the final act of the Government to evidence the transfer of title was to be the Government patent. (Section 4.)

This Court, in the case of *Wisconsin R. R. Co. vs. Price*, 133 U. S., 496, 511, shows that there were many matters to be determined as to the "indemnity" lands referred to, under statutes such as have been referred to, before patent could issue. No title could pass until selections were made, by the agents of the grantee, nor until such selections were approved by the Secretary of the Interior. The statute specifically requiring that the selection should be made subject to the "approval" of the *Secretary*, this Court held that his approval was essential to the efficacy of the selection, and to give to the company any title to the

land selected; that this action was judicial; that he was required to determine, first, whether there was any deficiency in the lands granted, so as to authorize the selection of "indemnity" lands; second, whether the particular "indemnity" lands selected were of a class that could be taken for these deficiencies. In disposing of these two questions, he had to inquire as to whether any lands in the place limits had been previously disposed of by the Government, or whether pre-emption or homestead rights had attached before the line of the road was definitely located. In determining whether a particular section could be taken as "indemnity," the Secretary was obliged to ascertain the condition of the proposed "indemnity" lands; to ascertain whether any portion of them had been appropriated for any other purpose; and until the selections were approved there were no selections in fact—only preliminary proceedings taken for that purpose, and the "indemnity" lands remained, therefore, unaffected in their title. (*Ibid.* pp. 511 and 512.)

How different are these statutes from the one under discussion, where the specific action on the part of the Government is a survey and location by the Surveyor-General, with no other provision for governmental action to define the selection and to complete the transfer of title.

Counsel for the Government, again, call attention to the Act of July 17, 1854, relating to the issue of certificates or scrip to certain persons of the half-breed or mixed blood of the Dakota or Sioux nation of Indians (10 *Stats.*, 304); and counsel cite the decision of this Court in the case of *Carter vs. Ruddy*, 166 U. S., 494, to the effect that this Court held that, under that statute, a patent was necessary to convey the title.

That statute differs from the statute construed

by this Court in the case of *Rutherford vs. Greene's Heirs*, and also differs from the statute now under discussion, under which the plaintiff in error claims, in one very important particular; and that is, that in the Act of July 17, 1854, there is absolutely no provision for any act on the part of the Government, in the acceptance, survey or location of the tracts of land selected by the holders of the scrip. It is a well settled principle that the title of the United States will not pass, as to a specific tract of land, without some action on the part of the Government as to that specific tract of land. Where the grant is by legislative act, a survey under Government authority or adopted as official by the Government, becomes the Government's Act, which gives precision to the title. There was no provision for any such action, in this statute which counsel cited. But in the case at bar, as in the case of *Rutherford vs. Greene's Heirs*, there was a specific provision for the official survey and location, by a designated representative of the Government.

We respectfully insist that the case of *Rutherford vs. Greene's Heirs* is conclusive and controlling on this question, and that this Grant, made to the heirs of Baca, must, under that decision, be considered as a grant *in præsenti*, which vested a title in the heirs of Baca, to which title precision was given by the survey made and approved by the Surveyor-General designated in the Act.

XI.

The Rights of the Heirs of Baca and Their Successors in Interest are the Same as if a Patent Had Issued on May 4, 1864.

We have discussed this subject quite fully in

our original brief; but we venture to make a few additional suggestions:

When the Commissioner, in his letter of February 12, 1864 (Printed Record, p. 38), said: "The statute does not order the issue of a patent. The aforesaid law of twenty-first June, 1860, with your plat, approved in the manner indicated, will therefore constitute the evidence of title," he was either right or wrong on a question of law. If he was right, then the title was, by the approval of the plat, fully transferred from the Government to the grantees, under the Act of Congress; and the final act in the transfer of title had been perfected. If he was wrong, then, by the completion of those acts resulting in this action of the Commissioner, the grantees named in the Act were, from that day, entitled to a patent; the right to such a patent had then become vested in them; and, under well settled principles of law, all their subsequent rights, as between themselves and the Government, or others claiming under the Government, must be considered as if the patent had, in fact, been issued at that time. When the only reason for withholding the patent is that there is no specific provision of law authorizing it, and yet there is a legislative grant, then, manifestly, the *right* of the grantee is not dependent upon the issuance of a patent as evidence of his title, but his right is complete when all other things are done, which the statute does require.

This Court has said:

"The right to a patent once vested is treated by the Government, when dealing with the public lands, as equivalent to a patent issued."

Stark vs. Starrs, 6 Wall., 418.

On the authority of the case last cited, we have argued in our original brief that our right, and, therefore, our title, became perfected when the certificate of the Surveyor-General approving the survey was received by the Commissioner of the General Land Office, and he found no valid objection to it. Counsel for the Government say now that the succeeding clause in this opinion, in some manner, affects our contention. That clause is as follows:

"That is to say, if the Donation Act of 1850 was applicable to the lands, his *right* to a patent became perfect when the certificate of the Surveyor and accompanying proof showed, in the judgment of the Commissioner, a compliance with its requirements. That they were satisfactory to his judgment in this respect follows from the subsequent issue by him of the patent."

Stark vs. Starrs, 6 Wall., 413 and 414.

We do not see the force of counsel's argument. This Court, in the quotation here made, expressly holds that the right to the patent existed when the certificate of the Surveyor and accompanying proof showed, in the opinion of the Commissioner, a compliance with the legal requirements. The clause added simply calls attention to evidence showing the fact of the Commissioner being satisfied, and does not change the rule as to the date when the grantee's rights culminated.

In our case, the Commissioner expressly held that the law did not provide for a patent. He, therefore, could not give evidence of his satisfaction with the proof and of our compliance with the law by that process; he does it equally effectually by another process, and that is; after he had required full proof as to the character of the land selected, as a necessary condition of approval of

the survey, he then, in express terms, authorizes such approval, and, in doing so, states that the approved survey will be the evidence of title. Surely, this shows, with equal certainty, that, in the judgment of the Commissioner, there had been full compliance with the requirements of the law.

Certainly, there is nothing in the quotation made by counsel from the case last cited which, in any way, weakens the force of the decision as an authority in support of our contention.

This Court, in the case of *United States vs. Schurz*, 102 U. S., 378, 402, speaking of the officers of the Land Department, says:

"From the very nature of the functions performed by these officers, and from the fact that the transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

"It is equally clear that this period is at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place, the land has ceased to be the land of the Government; or, to speak in technical language, the legal title has passed from the Government, and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land officers cannot restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title deeds destroys his title."

Is not this language applicable to the case at bar? The final act was performed in the spring of 1864. As early as May 4, 1864, all proofs had been received by the Commissioner, and all objections made by him had been overcome. The *final act* had been performed after a statement expressly made by him in writing, that the *evidence of title* in

the grantees would be the Act of Congress, and the plat approved by the Surveyor-General.

We respectfully insist, that under well established rules of law, the rights of the plaintiff in error must, at this time, be treated and acted upon in the same manner as if a patent had issued to the heirs of Baca on May 4, 1864.

XII.

The Adjudication of the Land Office, in 1864, to the Effect that the Land Covered by the Grant was not Mineral, is Conclusive.

The proposition that we have just announced would seem to follow as a logical legal result, if the preceding proposition advanced has been established; because, when the final act on the part of the Government is performed, so that the title has passed to the grantees, with all the conclusiveness of a patent, the final act which has this effect is in itself an adjudication that the land surveyed is the very land granted, and of the character designated in the grant.

We have heretofore discussed the facts relating to the adjudication in the Land Office; and it seems to us that these facts, when considered in relation one to another, conclusively show that this land was determined, in 1864, by proper representatives of the Government, to be non-mineral; that the Government was a party to that adjudication, and has ever since been bound thereby.

In our original brief we have presented decisions of this Court as to the conclusive effect of such adjudications; and if our argument hereinabove, and in our original brief made, is sound, that

the rights of the present plaintiff in error are to be considered as if patent had issued, then all those opinions of this Court which refer to the conclusive effect of a patent are authorities for us on this proposition. This Court has said:

"The execution and record of the patent are the final acts of the officers of the Government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the Government to which the alienation of the public lands, under the law, is entrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the Government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence."

Smelting Co. vs. Kemp, 104 U. S., 640, 641.

We submit that this language is properly applicable to the case at bar. Here, the letter of

February 12, 1864, authorizing the approval of the survey and plat, and expressly stating that these, with the Act of Congress, would constitute the evidence of title, has the same effect of an official declaration that all the requirements preliminary to that letter and direction have been complied with; and we insist that the presumptions attending it are not open to rebuttal in an action at law.

"When the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others."

See Steel vs. Smelting Co., 106 U. S., 451.

This Court, in the *Barden* case, speaking of the determination as to the character of the land, by the Land Department, said:

"The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other, will be considered as conclusive."

Barden vs. Northern Pacific R. R. Co., 154 U. S., 329.

XIII.

The Barden Case.

It has been urged by counsel for the defendant in error that the case of *Barden vs. Northern Pacific R. R. Co.* has made a change in the law, as announced by this Court, as to the proper construction of such an Act of Congress as that of June 21, 1860.

We insist that this contention is not well

founded. This Court, in its opinion, rendered by a majority of the Court, is very careful not to overrule the cases which we have heretofore cited, as to the proper construction of such acts. If we are right as to the effect of the action in the Land Department as being equivalent to a patent to the heirs of Baca, then that final act has been performed which, under the very letter of the *Barden* decision, will close the door to future inquiry as to the character of the land.

We however respectfully call attention to some distinctions between the Northern Pacific grant, which was involved in the *Barden* case, and the Act of June 21, 1860, under which we claim:

1. The Northern Pacific grant was a *donation* by the Government, to aid in the construction of a railroad. The Baca grant was made for a consideration, that consideration being the surrender of a claim which this Government was, by treaty, bound to protect; and the consideration was so exact as to require the precise equivalent of acreage, between the land granted and the land surrendered.

2. In the Northern Pacific case, as this Court has said, the grant included "an imperial domain in land;" while in the Baca grant case, as above suggested, it was but the equivalent, to the very fraction of an acre, of land previously held by the grantees, under a grant by the Government of Mexico.

3. In the Northern Pacific case, the statute expressly provided for a final act on the part of the Government officers, by the issuance of a patent, after many preliminary inquiries, and this final act of the Government had never been performed, at the time when the *Barden* case arose. In the Baca Grant there was no provision for patent, and the

final act provided by statute, for the severance of the land granted, from the public domain, was its survey and location by the Surveyor-General, and that final act was performed more than thirty-three years ago, with the approval of the Commissioner of the General Land Office.

4. In the Northern Pacific case there had been no specific finding that the land in controversy was non-mineral, and the only reliance for any contention as to its non-mineral character, was the return of the Surveyor, in the local Land Office, which, as it would appear from the report, was such return as the Surveyor would make in the general course of his duties, in running the township or section lines, on the public domain, without any special examination of the particular section of land referred to. In the Baca Grant case, however, there was a specific finding as to the non-mineral character of the land, by the very officer, and the only officer, designated by the statute to represent the Government in the location of the land, and this was supplemented by the certificate of the Register and Receiver, under the direction of the Commissioner, and in addition to that, there was a specific official investigation, by a Surveyor sent out for the express purpose of ascertaining and reporting upon the character as well as the boundaries of this selection. It was only after this evidence was submitted to the Commissioner that he authorized the approval of the location and survey.

5. In the Northern Pacific case this Court calls attention to the fact that the Grant was a grant to a railroad corporation. The Court says:

"Grants in aid of railroads (and we speak of *no other grants*), before such determination and

issue of patent, have never been held to pass other minerals than iron or coal."

The Baca Grant was a grant to individuals, by way of confirmation of a specific number of acres, in exchange for lands to which they had previously held title.

6. In the Northern Pacific case, as we understand it, the company had never been in the possession of the land, and had never paid taxes upon it. In the present case, however, the owners of Baca Grant No. 4 have been in possession for thirty years, occupying and improving the land and paying taxes upon it.

7. In the Northern Pacific case, this Court dwelt upon the fact, at the very inception of its argument, that a joint resolution had been passed by Congress, before any rights had accrued under the granting act, expressly providing that "no act passed at the first session of the Thirty-eighth Congress (that being of the year 1864), granting lands to states or corporations to aid in the construction of roads, or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which, in all cases, shall be, and are, reserved exclusively to the United States, unless otherwise expressly provided in the act, or acts, making the grant" (*13 Stats., 567*); and the Court says that this provision should be borne in mind when the statement is made, as it is, that there has been no reservation of mines or minerals to the Government.

On the other hand, the Baca Grant was made in 1860. There had been, then, no specific reservation of minerals, by general law. Reservations, theretofore, had, sometimes in terms, and at other times by clear implication, been confined to known

mines, or known mineral lands; and the very terms of this Grant show that the character of the land was to be determined within a period of three years, allowed for selection.

We respectfully insist, before this Court, that there is nothing in the case of *Barden vs. The Northern Pacific R. R. Co.* which is hostile to the contentions that we are urging in this case; and we insist that a decision in favor of the plaintiff in error in this case, affirming his rights to all the land included within his exterior boundaries, will, in no respect, be inconsistent with the majority opinion in the case of *Barden vs. Northern Pacific R. R. Co.*

XIV.

Plaintiff in Error is the Lawful Owner of the 99,289.39 Acres of Land Included Within His Exterior Boundaries, Even Though the Sporadic Occurrence of Mineral May Now be Disclosed.

This proposition would logically follow from all that has heretofore been said; but we submit, in this connection, that Congress, in granting this land to the heirs of Baca, must have contemplated what the facts in this case show did occur, to wit: that the owners would occupy the land; that it would be the subject of sale and conveyance to subsequent grantees; that it might subsequently be subdivided or improved; that Congress intended to make an actual and definite grant, and not a vague, illusory one, which should remain illusory through all future time, subject to the possibilities of disclosure of mineral which could not, at the time, be discovered.

In this connection we may suggest that the "opinion" attributed to Governor Gilpin in 1862, by Surveyor-General Case, was in the nature of mere gossip. Whether Governor Gilpin ever expressed such an opinion as Surveyor-General Case attributed to him, is a matter not established by proof. If he did entertain such an opinion, the fact nevertheless remains that he was deceived, so far as he ever knew; for he lived to an advanced age, and died without any mineral value having been found on this property. The meagre character of the alleged mineral discoveries made in 1876, as shown by the fact that one lessee after another abandoned the property because no profitable returns could be obtained therefrom, and the fact that there was no pretense of the discovery of mineral, to *any extent*, upon this property, prior to 1876, shows that Governor Gilpin was not justified in entertaining any opinion of mineral value in the property, in 1862.

The fact that the Grant had to be in square form made it almost inevitable that if water rights were to be obtained with it, and any timber, that some portion of the ground should extend into the mountains, and an examination of the field notes of Surveyor Sheldon, and of the plat which was approved by the Surveyor-General, shows that this land was selected for the purpose of its agricultural and grazing facilities, and not on account of mineral possibilities. It is situated in an arid region, where, in order to make it available for pastoral or agricultural purposes, the lands must be irrigated. Nine-tenths of the land is grazing or agricultural in its character. The supply of water for these lands, however, must come from the mountains, and in order to protect that water supply, the owner must control the sources of the

streams. A tract of the size of this Grant would require timber; the great body of the land is upon the level and treeless prairie of the San Luis Valley. The only available timber for the Grant is upon the slopes and along the base of the mountains, in the northeast corner. The mountainous portions, as shown by the survey, include only about one-sixteenth of the whole.

From 1864 down to the present time the Government of the United States has, by many official acts, recognized that this tract of land, as a whole, in square form, had been segregated from the public domain, and that the title thereto had passed from the Government and vested in individuals. All official maps issued since 1864, year after year, show this fact. Official reports of the Surveyor-Generals, and of the Commissioner of the General Land Office, and reports of the Secretary of the Interior, transmitted to Congress, all show the same fact. Certainly, it would be a great violation of the principles of equity, and a great overturning of property rights, to hold that, under these circumstances, there is still reserved, out of the square body constituting the Grant, some uncertain, indefinable extent of land, open to occupation by others; serving as an invitation to trespassers; and leaving, always, as an open question, for the uncertain determination of a jury, whether a given piece of five, or ten, or one hundred acres, is or is not more valuable for mineral than for agricultural purposes.

We respectfully insist that Congress intended that, when this land was surveyed, as *then known*, the grantees should receive the title; and that, under the circumstances of this case, the approval of the survey and plat had the effect of transferring

the title from the Government to the Government's grantees.

We respectfully ask that the decision of the trial Court may be reversed, with proper directions for the future trial of the cause, consistently with this contention.

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No. 154.

Office Supreme Court, U. S.
FILED
FEB 23 1898
JAMES H. MCKENNEY
CLERK.

Reply Brf. of Wolcott & Vaile for P. E.

IN

Filed Feb. 23, 1898.

THE SUPREME COURT

OF THE

UNITED STATES.

QUINCY A. SHAW,
Plaintiff in Error,

vs.

MURRAY M. KELLOGG,
Defendant in Error.

154

REPLY BRIEF OF PLAINTIFF IN ERROR.

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D. J. KELLY, PRINTER, DENVER.

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REPLY BRIEF OF PLAINTIFF IN ERROR.

I.

CORRECTIONS AS TO MATTERS OF FACT.

In our Supplemental Brief we have stated matters of fact quite fully, with references to the record; and for the most part we shall rest our statement upon what is in that brief set forth.

It seems important, however, to call attention to a few matters of fact as stated in the Supplemental Brief of defendant in error.

On page 8 of defendant's Supplemental Brief,

it is stated that in 1876 "a considerable number of miners were prospecting and mining in the mountains and upon this grant. * * * As early, at least, as 1876 the evidence shows a considerable number of miners on the grant, and the Eastern Star mine was located by three locators in April, 1876." (Record, pages 9, 80 and 81.)

An examination of the portions of the record referred to will not justify the statement as made by counsel. At page 9 of the record is a statement, contained in defendant's answer, which merely shows the location of the "Eastern Star lode," and no other prospecting or mining. At pages 80 and 81 the only reference is to the Eastern Star lode and to the possession of Mr. Herard, and the fact of his abandonment of that possession. This is a very slight foundation upon which to base the statement that a considerable number of miners were prospecting and mining on the Grant.

The effect of the evidence on page 81 of the Record is that the measurements, and sighting along stakes there mentioned, was with a view of keeping off the Grant, rather than on it, as shown by the action of Herard.

Counsel further says, on the same page of his brief:

"1876-1893. The possession has at all times been concurrent by the miners and the Grant claimants, from 1876 to the institution of this suit, the miners holding the mineral land and the Grant owners the pastoral and arable land."

The record does not justify this statement. At the pages referred to it shows that Mr. Kellogg was in possession of the Eastern Star mine, as a

lessee, by verbal contract with the owner of the Grant, and that, after the refusal of a second lease, he took possession of the mine and locked it up. It shows no distinction, such as counsel states, of mineral land held by miners, and pastoral and arable land held by the owners of the Grant.

Referring to our statement about the lease to Mr. Kellogg, counsel controverts the facts, as we urge them, and says:

"The record, on the contrary (pages 73 and 74), shows, by the evidence of the witness Adams himself, that the property leased was not the mine, but was a stamp mill, which had been, for many years before that time, upon the Grant, and which had been turned over to Mr. Adams, and there is not the slightest warrant in the record for the statement that these so-called leases related to the Eastern Star mine."

We fear that counsel has not diligently examined this record, or he would hardly have made this statement. The deed of December 10, 1885, from Gilpin to Adams, shows (page 68 of the printed record) that the owner of the Grant had made to the San Luis Gold Mining and Milling Company a lease for ninety years of the Eastern Star lode. The deed from Adams to Shaw of the fifteenth of March, 1887 (at page 71 of the printed record), shows the same fact. The examination of Mr. Adams, as a witness, was in reference to the property in controversy, which was the property designated by the defendant as the "Eastern Star mine." We quote a few lines from the evidence:

"Q. Do you know the defendant, Murray M. Kellogg? A. I do.

"Q. Are you acquainted with, and do you know the locality of that property of which he has taken possession, and is now occupying, which he calls the Eastern Star mine? A. I do." (Page 73.)

Referring to the deed from Gilpin to Adams, counsel inquires:

"Q. In that deed, and in a subsequent deed shortly afterwards made from yourself to Quincy A. Shaw, there is a reservation of a lease of property called the Eastern Star Lode and the Gold Legion Mine, the lease being to a company called The San Luis Gold Mining and Milling Company: state whether or not that company continued in possession, for any length of time, of this property under that lease? A. They did not.

"Q. What became of *the property*, so far as their occupancy and possession of it was concerned? A. They turned it over to me. (Page 73.)

* * * * * *

"Q. After *the property* had thus been surrendered to the owners of the Grant, and machinery, to a certain extent, taken away from the mill, did you have any conversation with Mr. Kellogg concerning a lease of this property? A. I did.

"Q. You may state whether or not a lease, verbal or otherwise, was made to him, at the time, for *this property?* A. I gave him a verbal lease for three months, I think, in 1887.

"Q. When did it expire? A. In December, 1887.

"Q For the purpose of his occupancy, you may state what was done in reference to this milling machinery which you had previously taken away from the premises? A. Well, after he had worked *the mine* a little while, he wanted to use the mill, and I gave him permission to use it, and I hauled parts of the machinery that was at the ranch up to the mill for him. He had it there for something like two months. He promised if I would loan him this machinery he would return it in as good order as I gave it to him. In about two

or three months I heard he had left the country and the mill, and everything, and parties were stealing the machinery. (Page 74.) * * * *

"Q. Mr. Adams, you may state whether, after the removal of this property by you, and after the expiration of the verbal lease you had given Mr. Kellogg, he subsequently made an application to you for a lease of this property. A. He did, the following spring.

"Q. State whether it was granted or refused. A. I refused it.

"Q. After the refusal of the lease to Mr. Kellogg, you may state whether or not Mr. Kellogg took possession of *this property?* A. He did take possession, and locked up the mine, and in the meantime the machinery and mill *had been* burned down.

"Q. You may state whether or not that possession which he took after you refused to give him a lease is the possession of which you are now complaining. A. Yes, sir; which he is now claiming." (Page 75.)

We submit that it is too plain to be the subject of debate, that this *property*, here mentioned in the general examination, refers to the property called the Eastern Star lode. This conclusion is further enforced by the language of the witness, at page 82. Referring to the old lease mentioned in the deed as having been made to the "San Luis Gold Mining and Milling Company," this testimony is found:

"Q. Did he [Kellogg] ever at any time have any connection with this lease of the Eastern Star mine, as mentioned in your deed? A. No, sir.

"Q. You say you had some talk with him about making a *new* lease: was he in possession of the mine or working it at the time you had the conversation? A. Yes; he had been in possession of it, but threw it up, as I stated a while ago, and left the machinery and left everything—left the coun-

try; claimed he could not make it pay; at least, that is what I understood he said." (Page 82.)

We submit that our statement of the facts in this particular, in the Supplemental Brief, is fully sustained by the record.

Counsel states, at page 11 of his brief, as to the certificate of the Surveyor-General concerning the non-mineral character of the land selected, as follows:

"No Surveyor-General has ever certified that this land is non-mineral, and such certificate, after due and proper proof, was made an essential requirement of the passing of title from the Government, from the first letter of July 26, 1860 (record, page 30), down to the final approval of the plat, under the authority of the letter of February 12, 1864."

This rather broad statement of counsel is made upon the theory that the certificate of the Surveyor-General, of date December 5, 1863 (printed record, pages 35 and 36), was disapproved and rejected by the Commissioner's letter of January 16, 1864 (printed record, page 37), and that, as no subsequent certificate of the non-mineral character of the selection was made by the Surveyor-General, it should be considered that no certificate was ever made.

This is not the theory upon which the Commissioner acted. The contention of the Commissioner, in his letter of January 16, 1864, was that the evidence furnished was not *sufficient*, in the opinion of the office, to prove that selection No. 4 did not cover valuable mineral deposits. The certificate was not rejected, but further evidence was

demanded, to justify the conclusion certified. That the Commissioner considered and acted upon this certificate and the letter which transmitted it, when supplemented by additional evidence, is shown by the letter of February 12, 1864, for, at that time, being subsequent to the letter of January 16, the Commissioner says:

"You transmit your certificate 'that the lands are not mineral and are vacant,' and state, under specific heads, 'the grounds on which' you 'have signed the certificate' and which are satisfactory to you. You report further that 'the survey, as made by Mr. Sheldon, is probably as near perfect as can be made, as the mountains at the northeast corner of the Grant are inaccessible at any time of the year.'"

The statements made in this letter are manifestly the basis—taken, of course, in connection with the other evidence which had been furnished the Commissioner—for the final conclusion in the same letter, to wit:

"The original field notes, duly verified and authenticated, must be filed in the Surveyor-General's office of Colorado. Upon bringing these to the usual satisfactory tests, and finding the same all regular and correct, *you are authorized*, in virtue of the aforesaid sixth section of the said Act of 21st June, 1860, *to approve the said survey;* but in your certificate of approval you will add the special reservation stipulated by the statute—but not to embrace mineral land, nor to interfere with any other vested rights, if such exist.

"The statute does not order the issuance of a patent. The aforesaid law of 21st June, 1860, with your plat approved in the manner indicated, will, therefore, constitute the evidence of title." (Printed Record, pages 38 and 39.)

Counsel, at the conclusion of his brief (pages

25 and 26), sets forth, in full, a motion made by him at the conclusion of the plaintiff's evidence in the trial court, for a direction to the jury to render a verdict in favor of the defendant. The motion involved five points, which, abridged, are as follows:

First.—That there was no sufficient or proper selection within the three years allowed by the statute, by reason of the uncertainty of description in the selection as then described.

Second.—Because the Act of Congress reserved mineral land, and it is conceded that the land in controversy is now mineral in character.

Third.—Because the proof of the plaintiff showed no sufficient survey within three years after selection by Watts.

Fourth.—That the approval by the Surveyor-General of the plat was subject to the provisions and conditions of the Act of Congress; that the Surveyor-General's certificate of December 5, 1863, had been rejected, and that no further certificate had been made by the Surveyor-General.

Fifth.—Because the evidence showed that William Gilpin attempted to locate the Grant, in violation of the terms of the Act of Congress, and with knowledge that he was seeking to take mineral land.

Counsel then says:

"This motion the Court sustained, instructing the jury at some length, and discussing the questions involved, and stating the reasons for directing a verdict in favor of defendant."

This statement of counsel would suggest that the Court had sustained all five of the points

urged, when, in fact, he rejected the first and third, and ignored the last part of the fourth and all of the fifth. The Court, in instructing the jury, stated, among other things, as follows:

"Objection is made that the location was not within the time limited by the Act of Congress, which was three years, and that is put upon the ground that there was no sufficient description of the tract located to make it known to the public at large where the location would be, and upon the ground that the initial point from which the survey of the tract would be extended was not a fixed and determinate point. That was declared in the paper filed with the Surveyor-General of New Mexico to be the point where the thirty-eighth parallel of latitude crosses the base of the Snowy Range, which divides the waters of the Arkansas and Del Norte rivers, at the eastern edge of the San Luis Valley. It is said that this is not sufficient to fix the location, and there should have been some monument or some natural object open to the view of all people, from which the lines should be run. Upon that I do not care to enter at length. *I shall assume that the testimony which has been delivered before you is sufficient to enable you to determine this point, and that you would determine it under the testimony to have been properly fixed.* If the location was so designated as to be understood by the public at large, I am of the opinion that the circumstance that no survey of the location was made within the three years following the passage of the act, is not material. A survey was, in fact, made in the latter part of the year 1863, and about six months after the expiration of the three years mentioned in the act. I assume, also, that the survey made by Mr. Sheldon was sufficient in form. The lines were not closed at the northeast corner; there were three or four miles of the north line, and, perhaps, a greater length of the east line, which were not laid at that time, because of the difficulty in traversing the mountains. The surveyor states, in his notes, that he found it impossi-

ble, at the season of the year in which he was carrying on the work, to proceed over the mountains, and so the lines were not laid at the time. *This survey having been accepted by the officers of the Land Department, and approved by them, it cannot be alleged that it was not in form sufficient, or that there was any defect in it, from the circumstance that a portion of the lines were omitted from the survey at the time it was made.*" (Printed Record, pages 145-6.)

The Court then takes up the one point as to the mineral character of the land. This is the one ground upon which the motion was granted, and is the subject which has been the theme of discussion in all our briefs.

II.

As to the Sufficiency of the Original Description of the Selection of Baca Grant No. 4.

Counsel now raises, for the first time in this tribunal, a contention that the original description of the selection made by the heirs of Baca under the Act of Congress, for this location No. 4, was too uncertain and indefinite upon which to base any rights.

We submit, at the outset, that this is not a question now open for consideration in this Court. As shown by the instructions already quoted, the contention was decided by the trial court adversely to the defendant in error. No cross-errors are here assigned. This is an action at law, and counsel cannot urge that the judgment, if erroneous on one ground, should, nevertheless, be affirmed,

because some other fact might justify the same verdict.

There is, however, absolutely nothing in the contention made by counsel. The initial point for the description of the square tract of land was "A point on the eastern edge of the valley of San Luis, where the 38th parallel of north latitude crosses the base of the Snowy Range, dividing the waters of the rivers Arkansas and Del Norte." (Printed record, page 32.)

The 38th parallel of north latitude was certainly a definite line, which could be ascertained with absolute precision. A line marking, at the same time, the base of a range and the edge of a valley, may be definite or indefinite, according to conditions. Undoubtedly, there are many cases where it would be exceedingly indefinite. The peculiarity, however, of the San Luis Valley and the Sangre de Cristo range, which is its eastern boundary, is that the mountains rise very abruptly from the plain below.

A great deal of evidence was taken upon this subject in the trial court, with the result that the Court concluded that the jury would be well justified in finding that this initial point was specific. Albinus Z. Sheldon, who made the government survey in 1863, testified at the trial of this cause that, from the conditions existing on the ground, it was not a serious difficulty to ascertain this point; that it was practicable to find it; that he satisfied himself that he did find it, and that no other point, east or west of the point by him selected, would be as accurate a designation of the call as the point so by him determined. (Printed Record, pages 109 and 110.)

Z. T. Duval, an experienced civil engineer, made a careful examination of the locality and adjacent country, and, after a very full statement of grades, profiles, etc., his testimony is as follows:

"Q. From your examination of this country, at the vicinity of the initial corner, the country a mile south of it, the country a mile north of it, and the country east and west of it, and northeast and southwest of the initial corner, I will ask you to state whether, in your opinion as an engineer, or whether you, as an engineer, going upon that land with this sort of a call, could locate your point of starting—that is, assuming, for the purpose of my question, that the north boundary of the Baca Grant is on the 38th parallel of latitude, east and west? A. Yes, sir.

"Q. Commencing at a point on the eastern edge of the San Luis Valley, where the 38th parallel of latitude crosses the base of the Snowy Range, dividing the waters of the Arkansas and Del Norte Rivers, with your knowledge now of the ground, could you, as a surveyor, locate that point? A. Yes, sir.

"Q. Where would you, as a surveyor, locate it with reference to the point which is now claimed as the initial corner? A. I should have located it there." (Printed record, page 123.)

Thomas L. Darby is not only an experienced civil engineer, but was employed by the Government to make a complete survey of the eastern and northern boundaries of this grant in the extreme mountainous portions. He testified on the subject of the location of the initial point as follows:

"Q. From your knowledge of the country, which is acquired both from your old survey of the north boundary and your study of the country at

that time, and from your study of the country on this recent trip, you may state whether or not it would be practicable, in your opinion, and whether you could, as a surveyor, go upon the ground and definitely locate the initial corner of the Baca grant, if you had no call except the following: 'Commencing at the eastern edge of the San Luis Valley, where the 38th parallel of latitude crosses the base of the Snowy Range dividing the waters of the Arkansas and the Del Norte rivers'—assuming, for the purpose of the question, that the north boundary of the Baca Grant No. 4 is on the 38th parallel of latitude, could you, as an engineer, with no other call than that, find the initial corner? A. Yes, sir.

"Q. You may state, if you were to locate the initial corner upon such a call, where you would locate it in reference to the point where Mr. Sheldon located it? A. I think I should locate it just about there; may be a foot or two one way or the other, but right in that immediate locality." [*De minimis non curat lex.*] (Printed record, page 134.)

Whatever the fact may be as to the certainty of this point, *a survey was made*, by Government authority, in 1863, and a monument was then planted at the place selected as the initial point. It is not contended that at that time any adverse rights existed. The earliest date fixed for any adverse rights is in 1876, nearly thirteen years after a permanent monument had been established fixing the initial point for the description of this square body of land, and fixed, too, by Government authority. Before any adverse rights had arisen, therefore, the grantees on the one side and the Government on the other were parties to the location of the land.

We have cited, in our original brief, authorities bearing upon the effect of such a survey. We,

however, venture in this connection to repeat two or three quotations:

"When it [the survey] was made, and the field notes returned to the Surveyor-General's office, and the description and plat made out in form, and approved by the Surveyor-General, it was *conclusive evidence*, as against the United States, that the land granted by the confirmation of Congress was the same described and bounded by the survey, unless an appeal was taken by either party or an opposing claimant to the Commissioner of the General Land Office. This consideration depends on the fact that the claimant and the United States were parties to the selection of the land; for, as they agreed to the survey, they are mutually bound and respectively estopped by it."

Menard's Heirs vs. Massey, 8 How., 293, 313.

"When the surveys were made and the plats returned and approved and recorded by the Surveyor-General of Illinois and Missouri, and recognized as valid at the General Land Office (as the patent to Forsyth shows it was), it binds the parties to it, the confirmee and the United States; nor can either side be heard to deny that the land granted by the Act of 1823 is the *precise* lot Forsyth was entitled to, such being the settled doctrine of this Court."

Bryan vs. Forsyth, 19 How., 334, 336.

"If the claim be to quantity and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the lands segregated."

Landeau vs. Hanes, 21 Wall., 521, 530.

It is very apparent that there was nothing in the law making this Grant, which required that

the survey by the Government should be made within three years. The three-year limitation related only to "the right hereby granted to said heirs of Baca." But the right granted to the heirs of Baca was to *select* a certain quantity of vacant land, not mineral, in the territory of New Mexico, to be located by them in square bodies, not exceeding five in number. No limitation is fixed as to the time when the selection shall be surveyed. We think it is true that if the heirs were so unfortunate, in a particular selection, as to have obtained mineral land instead of non-mineral land, and this fact was ascertained after the expiration of the three years, and *before approval of survey*, they would suffer an abatement of their holding, to the extent of the mineral land then so found to have been chosen. And in such a case it would probably be the duty of the Land Department to cut out that portion of the selection found to be mineral in character and to approve a survey only for the remainder. If, on the other hand, the lands selected within the prescribed period were ascertained by the Surveyor-General to be non-mineral, at the time of survey, then, with equal certainty, the title would, upon the approval of such survey, pass to the grantees, to the full extent of the selection enclosed by the survey.

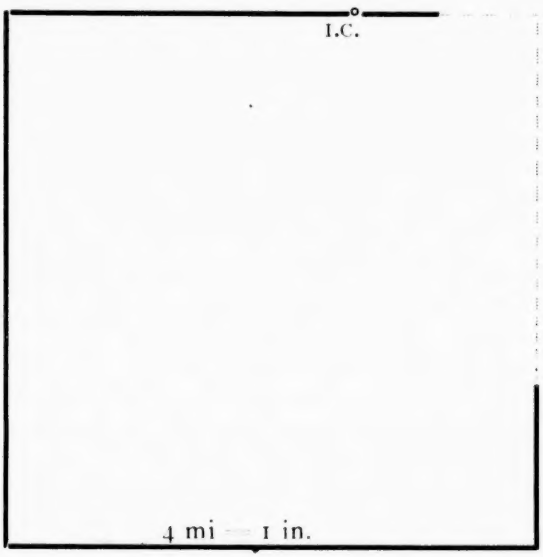
III.

Sufficiency of the Sheldon Survey.

Counsel for defendant in error contend that the uncertainty of the initial point of the selection,

as originally described prior to survey, "taken in connection with the conceded fact that for twenty-nine years the lines of the survey upon the ground to the extent of eleven miles of said grant remained wholly unclosed, unmarked, and never in fact surveyed, amply warrants the Court in holding that the indefiniteness of the original survey was not aided by any subsequent acts, as against miners and other claimants whose rights arose in the intervening period." (Defendant's Supplemental Brief, page 19.)

The following diagram shows, in solid black lines, the portion of the survey actually traced upon the ground, and marked by monuments at every half mile. The dotted lines show the portion which Mr. Sheldon did not actually traverse, and was therefore not marked by monuments on the ground:



It is to be observed that the figure required by law for this Grant was the simplest imaginable form of enclosure. The land was to be taken in *square* form. Certainly, if only two adjacent lines of a *square* are given, there is no uncertainty as to the locality of the other two sides of the figure. But when we find, actually marked by monuments on the ground, not only the whole of two adjacent sides, but also more than four-fifths of a third one, and one-third of the fourth side, and as these two last lines, extended, must intersect each other, there is no room for uncertainty as to the land which is enclosed. It is a very common experience in surveying, and especially in a mountainous country, that boundary lines will fall in inaccessible places, and that their exact location has to be determined by computation, from ascertained data, and from monuments which are in accessible places. The fact that this is so does not make the survey incomplete or indefinite, in any sense.

There was, however, a subsequent, so-called "completion survey" made of the east and north boundaries of this Grant before the institution of this suit. This supplemental survey was made under authority of the Government, and at Government expense. (Printed record, pages 105 and 107.) That survey was made by Thomas L. Darby, a witness on the trial of this cause, and, while this witness reached the northeast corner, near Crestone Peak, yet there was a mile and a half on the east line that even he could not traverse. (Printed record, page 130.) And, as to the third mile east of the initial corner, on the north boundary, his notes say:

"Impossible to take any witnesses. Offsets were made, to avoid bluffs and very heavy slide rock." (Printed record, page 107.)

While the Government did, in 1892, have this further survey made of the boundary line of the northeast corner of the Grant, it is difficult to see how, for any practical purpose, this additional survey is of value or makes the boundaries of the Grant any more specific than they were under the Sheldon survey.

The Sheldon survey, however, having been made under official sanction and approved by the Surveyor-General, under the direct authority of the Commissioner of the General Land Office, the trial Court was undoubtedly correct in saying:

"This survey having been accepted by the officers of the Land Department and approved by them, it cannot be alleged that it was not in form sufficient, or that there was any defect in it, from the circumstance that a portion of the lines were omitted from the survey at the time when it was made."

Certainly, there is nothing in the contention urged by the defendant in error upon this point, which can avail him in this Court, on this hearing.

IV.

Land Office Adjudications Relating to Baca Grant.

In the brief purporting to be filed on behalf of the United States on December 13, 1897, allusion is made to two decisions made in the Land Office, under the Act of Congress here involved, being cases relating to *Baca Float No. 3*, 12 Land De-

cisions, 676, and 13 Land Decisions, 624. Counsel for the Government urge these authorities as showing that the Secretary of the Interior did not deem the question of the mineral or non-mineral character of the land as determined until he or some officer of the Government thereto duly authorized had judicially passed upon the matter or until a patent was issued; and counsel for defendant in error now, in his Supplemental Brief, refers to and quotes from the same decisions.

These decisions from the Land Department, as we look at the case, instead of being of assistance to the defendant in error, corroborate and support the argument which we have made, to the effect that by the survey and its approval in 1864, the title to Baca Grant No. 4, had passed from the Government to private individuals.

The decisions referred to, relating to Baca Grant No. 3, were based upon an application to survey, that Grant never having passed to the stage which ours has reached, of a survey actually approved by the Surveyor-General, under the authority of the Commissioner of the General Land Office.

The decision of the Secretary of the Interior in *Baca Float No. 3* (12 L. D., 676), was to the effect that before an official survey should be authorized, a hearing should be had with a view of determining the character of the land embraced in the location; and this was manifestly upon the theory, for which we have always contended, that an approved Government survey would pass the title. So long as there had been no approved Government survey, the case was open for consideration as to the character of the land.

This distinction is recognized in the very quotation made by counsel, at page 22 of his brief, which includes the following sentence:

"And the department may, at any time *before the title passes from the Government*, require the claimants to show that the land is not mineral, although the character of the land may not have been known to claimants at the date of selection or location."

If, in our case, the land had been discovered to be in fact mineral prior to March 18, 1864, when the plat and survey were approved by the Surveyor-General, then a like question would have arisen. It is possible that a like discovery of mineral, made prior to May 4, 1864, would have prevented title passing to us, if the Commissioner had then made objection to the approval of the plat and survey by the Surveyor-General. Our contention is, that after a refusal by the Commissioner to authorize the approval of the survey until the character of the land, as to mineral, was ascertained, and after all evidence had been furnished which he required upon the subject, his direction then to approve the survey and plat, and his acceptance of the approved survey and plat without objection, terminate the proceedings. Title had then passed, and nothing further was open for the consideration of the Land Department thereafter.

The very decisions in 12 and 13 L. D. seem to imply that such approval of survey would pass the title. No allusion is made in those decisions to a patent, and *survey* is not authorized until after a hearing as to the mineral or non-mineral character of the land. This, however, is exactly

the line of policy pursued by Commissioner Edmunds, under the same act, in 1863, where, before approval of the survey, he required evidence that the land selected was not mineral in character. (See letter of January 16, 1864, printed record, page 37.)

Doubtless, this Baca Grant No. 4, was in the mind of the Assistant Secretary of the Interior, when, in 12 L. D., page 681, he says:

"Other locations made upon this measure of quantity, and in the hands of other assignees, have been perfected and *passed beyond the control of this Department.*

We have quoted, in our original brief, from a decision of the Secretary of the Interior, in 5 L. D., referring to the same Baca Grant No. 3, in which Secretary Lamar fully recognized our contention that, as to Baca Grant No. 4, the mineral or non-mineral character of the land had been passed upon by competent authority, and that the title had passed from the Government and vested in private individuals, and that the Land Office had no authority to reopen the question, and that the land could no longer be regarded as a part of the public domain. (5 L. D., 705.)

We very respectfully but earnestly insist that this Grant should be maintained in its integrity; that under well settled principles, announced by this Court for many years, and which have ripened into rules of property, the title to this land, as it was known at the time of the approval of the survey and plat, must be deemed to have passed from the Government and vested in the grantees named in the Act of Congress, and that subse-

quent grantees of that land should not now have their possession molested by persons who claim to have discovered mineral many years after the survey was made and the land segregated from the public domain.

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JOEL F. VAILE,
Attorneys for Plaintiff in Error.

No. 154.

Brief of Smith for D. E.

Filed Dec. 6, 1897.

FILED,
DEC 6 1897
JAMES H. McKENNEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

QUINCY A. SHAW,
Plaintiff in Error,
vs.
MURRAY M. KELLOGG,
Defendant in Error.

No. 154.
(16252)

On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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This case having been decided in the trial Court (the Circuit Court of the United States for the District of Colorado) upon a motion for an instruction for a verdict for the defendant, upon the plaintiff's evidence, there can be no controversy about the facts in the case. The statement contained in the brief of plaintiff in error is quite full, and sets out substantially all the record evidence. (Printed record, pages 1–16.) And we therefore content ourselves with a brief summary of the

facts in a more connected form, as a basis for our discussion of the law of this case.

After the passage of the Act of June 21, 1860, in favor of the Baca heirs, nothing further was done in the interest of the grantees until February 9, 1863, when John S. Watts, as the attorney for the heirs of Luis Maria Baca, filed in the office of the Surveyor General of New Mexico a letter dated December 12, 1862, stating that as such attorney he had "this day selected as one of the five locations belonging to the said heirs under the sixth section of the Act of Congress, approved June 21, 1860, a tract of land in the Territory of New Mexico, described as follows:

"Beginning at a point on the eastern edge of the Valley of San Luis, where the thirty-eighth parallel of north latitude crosses the base of the snowy range dividing the waters of the rivers Arkansas and Del Norte, thence east along said parallel four and one-half miles, thence south along a meridian line twelve miles, thirty-six chains and forty-four links distance; thence west at a right angle twelve miles, thirty-six chains and forty-four links distance; thence north to the said specified parallel; thence east with said parallel to the place of beginning.

"I further state that the said land is entirely vacant, not claimed by any one, is not mineral, but located for purposes of arable and pastoral agriculture, and is within the Territory of New Mexico as established in the organic act. I hereby accord-

ingly make application for the survey and location of the tract of land in accordance with the provisions of the above Act of Congress.

"JOHN S. WATTS,
"*Attorney for Heirs of Luis Maria Baca.*"

Printed record, pp. 3 and 4.

By the express provision of the Act of June 21, 1860, the right thereby granted to the said heirs of Baca was to continue in force during three years from the passage of the said Act, and no longer (record, page 2), and it is conceded that the letter of December 12, 1862, was the only act or thing done by the heirs of Baca, or in their interest prior to June 21, 1863, when their right of selection expired. On February 24, 1863, the Territory of Colorado having in the meantime been organized and including within its boundaries the lands in controversy, and a Surveyor General having been appointed for the Territories of Colorado and Utah, the Surveyor General of New Mexico transmitted to the Surveyor General of Colorado a copy of the foregoing application of Watts, as the attorney for the heirs of Luis Maria Baca, and thereupon the Surveyor General of Colorado, on February 24, 1863, reported to the Commissioner of the General Land Office the fact of his having received a copy of such application, and added this significant statement: "I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca 'floats' and

should locate it as this is located, *for the reason that, in his opinion, it would cover rich minerals in the mountains.*" (Rec., p. 4.) The receipt of this communication was acknowledged by the acting Commissioner, on March 13, 1863, in a letter addressed to the Surveyor General of Colorado and Utah, in which, among other things, the statement of Governor Gilpin was referred to as being important, and the necessity of proof of the non-mineral character of the land being had before the application could be approved, was emphasized as follows:

"It is necessary, before the application can be approved by this office, that it be accompanied by the certificates of the Surveyor General and the Register and Receiver that the land selected *is vacant and not mineral.* This is in accordance with our instructions to the Surveyor General of New Mexico, extracts from which were furnished your office in our communication of June 7, 1862. Especially should the character of the location as to minerals be carefully ascertained after the important statement of ex-Governor Gilpin, which you communicated in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable you to do so, you will transmit to this office your official certificate setting forth these facts."

"You will also correspond with the Register and Receiver of Colorado when they enter upon their official duties, communicating to them the

substance of this communication, and call upon them to furnish their certificate, when able, under the same conditions that your own is to be furnished under, which, when received, you will forward to this office.

"Very respectfully, your ob't serv't,

"JOSEPH S. WILSON,

"*Acting Commissioner.*"

Printed record p. 5.

On October 13, 1863, John Pierce, Surveyor General of Colorado, who had, in the meantime, succeeded F. M. Case, advised the Commissioner of the General Land Office that application had been made to him by Governor Gilpin for a survey of the grant, and stating that Mr. Gilpin was desirous of taking immediate possession and improving the said grant, and that to do so, it would be necessary to have the survey made during the ensuing six weeks, and that while, in his opinion, he had no authority to order the survey and make a contract therefor, he had done so, subject to the approval of the General Land Office, Mr. Gilpin having secured him as to the expenses, by the deposit of money to cover the costs thereof, but that, if disapproved, the survey would be considered as a private one and not official. (Printed record, page 6.)

Under this arrangement, the Sheldon survey was made, it having been commenced upon October 22d and concluded November 4, 1863. Under

date of November 2, 1863, the Commissioner of the General Land Office returned the contract with the Deputy Surveyor, Mr. Sheldon, without approval, and called attention to his former letter of March 13, 1863, and to his explicit instructions with respect to ascertaining the character of this location as to minerals. (Printed record, page 6.) On December 12, 1863, the Surveyor General of Colorado acknowledged the receipt of the letter of November 2d, disapproving of the contract for the survey of Baca Grant No. 4, and transmitted therewith his certificate that the land was not mineral and vacant, and proceeded to give his reasons for making such certificate. (Record, pages 7 and 8.) In the printed record (page 10), there is printed, together with the certificate of the Surveyor General to the non-mineral character of the land, a certificate in the same form, signed by the Register and Receiver of the Land Office, for the District of Colorado, under the same date, December 5, 1863, as the certificate of the Surveyor General. This latter certificate, however, would seem to have been procured by Governor Gilpin, and *not furnished to the Surveyor General, or filed in his office*, because it does not appear in the case until the 26th day of February, 1864, upon which date the Commissioner notified the Surveyor General of Colorado that among the papers deposited in his office by Mr. Gilpin was a certificate of the Register and Receiver at Golden City, Colo., that

the lands covered by the Baca Grant No. 4 were not mineral. (Printed record, page 10.) On January 16, 1864, the Commissioner of the General Land Office acknowledged the receipt of the letter of the Surveyor General of 14th of December (12th) with the enclosed certificate, relating to the fourth location of the Baca heirs, suspending the approval of the selection, the letter being as follows:

"*GENERAL LAND OFFICE.*

"JANUARY 16, 1864.

"*John Pierce, Esq., Surveyor General, Denver City, C. T.*

"SIR: Your letter of the 14th December last, with inclosed certificate relating to the 4th location of the Baca heirs, is received. The Act of 21st June, 1860, confirming the claim of Luis Maria Baca, authorized the heirs of said Baca to select, in lieu of the tract claimed by the town of Las Vegas, an equal quantity of *vacant* land *not mineral*. With a view to carry out the requirements of the law, the Surveyor General of Colorado was required, in our instructions of June 7, 1862, to accompany the final rendition of the certificate with his own statement, and also that of the Register and Receiver setting forth the fact that the land selected is vacant and not mineral. Those instructions were reiterated in our letter of March 13, 1863.

"The evidence furnished by you is not sufficient, in the opinion of this office, to prove that the selection No. 4 does not cover valuable mineral

deposits. Your certificate is not based upon actual knowledge of the facts, but upon the information and conclusions deduced from reasoning. This kind of proof is not deemed sufficient when large public interests may be involved, and the character of the location is made still more doubtful by the statement of ex-Governor Gilpin, officially communicated to this office by Surveyor General Case, that there are mineral lands in that locality.

"The statement of the Register and Receiver, required in our instructions, is also wanting.

"The approval of the selection will stand suspended until some satisfactory proof is obtained upon the points indicated.

"Very respectfully, your obedient servant,

"J. M. EDMUNDS,

"*Commissioner.*"

Printed record, p. 8.

On February 12, 1864, the Commissioner of the General Land Office sent to the Surveyor General of Colorado the latest instructions, which the record in this case shows to have been made by the Land Office, or received by the Surveyor General, prior to the approval of the survey and plat by the Surveyor General of Colorado, and to this letter we especially call the attention of the Court. It is found in full on pages 9 and 10 of the printed record. The proceedings of the Surveyor General with respect to said survey, prior to that date, are pronounced irregular, and express directions are given with respect to the approval of the said survey and plat, in the following language:

"The original field notes, duly verified and authenticated, must be filed in the Surveyor General's Office of Colorado. Upon bringing these to the usual satisfactory tests, and finding the same all regular and correct, you are authorized, in virtue of the aforesaid 6th section of the said Act of 21st June, 1860, to approve the said survey, but *in your certificate of approval you will add the specific reservation stipulated by the statute—but not to embrace mineral land*, nor to interfere with any other vested rights, if such exist.

"The statute does not order the issue of a patent. The aforesaid law of 21st June, 1860, with your plat approved in the manner indicated, will therefore constitute the evidence of title.

"You will take care so to arrange the matter, that hereafter, when, in the gradual progress of the lines of the public surveys, they shall reach the Baca location, they shall be properly connected therewith and so appear on the township plats.

"Very respectfully, your obedient servant,

"J. M. EDMUNDS,

"*Commissioner.*"

Printed record, pp. 9 and 10.

The only other letter bearing upon the matter is the one of February 26, 1864, already mentioned, which returned to the Surveyor General of Colorado certain papers deposited in the Land Office at Washington, by Mr. Gilpin, and which were, in the language of the Commissioner, "transmitted for such action as you shall deem proper in the premises, in accordance with the views expressed

in our communication to you, dated the 12th inst." Immediately upon the receipt of these last mentioned papers from the Commissioner, the Surveyor General of Colorado approved the field notes of the survey on March 15, 1864, and upon March 18, 1864, he approved the plat in the following language:

"The above map of the boundary lines of grant No. 4 of the heirs of Luis Maria Baca, in San Luis valley, Colorado Territory, as surveyed by Albinus Z. Sheldon, under his contract bearing date the 7th day of October, 1863, is strictly conformable to the field notes on file in this office, which have been examined aud approved, *subject to the conditions and provisions of Section 6 of the Act of Congress approved June 21, 1860.*

"JOHN PIERCE,

"*Surveyor General, Colorado and Utah.*

"*Surveyor General's Office, Denver, March 18, 1864.*"

Printed record, p. 11.

The transcript of the field notes thus approved and the plat of the survey thus approved were, on March 29, 1864, transmitted to the Commissioner of the General Land Office, and the receipt of the same was acknowledged on May 4, 1864, as follows:

"*GENERAL LAND OFFICE.*

"May 4, 1864.

"*John Pierce, Esq., Surveyor General, Denver City, C. T.*

"SIR: Your letter of March 29th last, transmitting transcript and field notes of the survey of

grant No. 4 of the heirs of Luis Maria Baca, has been received at this office.

"Very respectfully, your obedient servant,

"J. M. EDMUNDS,

"*Commissioner.*"

Printed record, p. 11.

The record, therefore, seems to justify the following propositions:

At the time of plaintiff's grant (Act of Congress, June 21, 1860; printed record, page 2) there was no law or method by which any citizen could obtain title to mineral land of the United States, and to put it beyond question, the Act under which plaintiff claims expressly reserved mineral land from location.

Gov. Gilpin bought the right to locate this grant before it was located, and had it located and surveyed under his personal supervision, and with the expressed intention of making it "cover rich minerals in the mountains" (printed record, pages 5-7), and title remained in him until 1885—nine years after the location of the Eastern Star Mine.

Hon. J. M. Edmunds, Commissioner of the General Land Office having been notified by Surveyor General Case of such intention, took every precaution to see that this grant as located should not take mineral land.

The Eastern Star Mine was located in April, 1876 (printed record, page 2), and has been continuously in the possession of defendant in error

and his grantors since that date, which was nearly three years prior to the letter of Commissioner Williamson, from which so much is claimed by plaintiff in error.

Nearly three years after the location of the Eastern Star Mine, Gov. Gilpin applied for a patent, which was refused, and no patent has ever issued.

There is now no question as to the land being mineral land. The pleadings admit it, and the Court below so certifies it. (Printed record, page 2.)

The approval of the plat and survey by the Surveyor General contained, by the express order and direction of the Commissioner of the General Land Office, the special reservation stipulated by the statute, that the location should not embrace mineral land (printed record, page 10), and this status remained unchallenged and unchanged until nearly three years after the location of the Eastern Star Mine, and until the writing of the letter of Commissioner Williamson.

The contention of defendant in error upon the foregoing state of facts is that the character and extent of the title to the land in controversy which passed to the heirs of Luis Maria Baca and their grantees by the Act of Congress is defined and limited by the force and effect of the official acts of the Land Department of the United States prior to May 4, 1864, while the plaintiff in error relies

very largely upon certain further letters and so-called decisions of the Land Department of the United States, written and made long after the approval of the survey and plat by the Surveyor General of Colorado, and its receipt as thus approved by the Commissioner of the General Land Office. These subsequent acts are fully set forth in the record (pages 12–15) and in plaintiff's brief, (pages 12–18.)

In paragraph 15 of counsel's brief, page 13, we come to the letter of Commissioner Williamson of March 21, 1879, written fifteen years after the approval of the plat and survey, and there, *for the first time*, is found an official statement that the question as to the mineral or non-mineral character of said land has been passed upon by competent authority. The letter is given in full on pages 13, 14 and 15 of counsel's brief, and on pages 12, 13 and 14 of the printed record, and would seem to have been written in response to an application by ex-Governor Gilpin for a patent to the land. We will here say that our position with respect to it is that it was not a decision upon any application in which the mineral or non-mineral character of the land was to be determined, or in which there was any hearing with respect thereto, or with respect to the rights of third parties, and was wholly *ex parte*, and that, giving to it its utmost effect, it is merely a recital of the opinion of Commissioner Williamson as to the legal effect of what had hap-

pened fifteen years before, and, above all, that the letter itself shows that his opinion was *based upon a direct and obvious mistake of fact* in saying that the question as to the mineral or non-mineral character of this land had been passed upon by competent authority, because the record of the case shows beyond a question that, up to and at the time of the approval of the plat and survey by the Surveyor General of Colorado, the question as to whether the land was mineral or not mineral *had not been passed upon*, but, on the contrary, under the specific and direct instructions of the Commissioner of the General Land Office, had been expressly reserved in the approved plat and survey, the only evidence of title which, under the laws as they then existed, could be given to the owners of the grant. The further letters contained in counsel's brief from succeeding Commissioners of the General Land Office add nothing to the letter of Commissioner Williamson, because, in each instance, they expressly follow and adopt the conclusions and statements of that letter, and it is worthy of note that, at the time when Commissioner Williamson wrote his letter of March 21, 1879, the defendants in error and their grantors had been, for upwards of three years, in the actual possession of the land in controversy as a mining claim, the claim having been originally located in 1876. (Printed record, page 2.)

Counsel for plaintiff in error rely upon three

propositions, which, for convenience, we here restate:

"1. As early as May 4, 1864, the title of the government was divested, and that of the heirs of Baca fully perfected as to that tract of land designated as Baca Grant No. 4, and the rights of the plaintiff are the same as if government patent had then been issued for said lands.

"2. The proper officers of the government, after investigation of the facts, determined, in 1864, that the land in controversy was not mineral. That determination is conclusive against all subsequent claimants.

"3. No subsequent discovery of mineral could divest the title derived through the grant made by Congress to the heirs of Baca, or except therefrom any portion of the surveyed premises."

And taking them in their order, we submit the following with respect thereto:

The first proposition states only part of the truth, as we contend. The essential omission is the entire failure to recognize that both by the Act of Congress and by every act of the officers of the Land Department, prior to May 4, 1864, and including the final approval of the plat and survey, distinct reservation was made of mineral land, so that if counsel's first proposition was amended by substituting for the words "government patent" the words "an approved location with a reservation of mineral land," it would fairly state both the law and the facts. In truth, that

is our whole contention. The plat and survey operate only to segregate the land and fix and define its location, and *if there had been no reservation in the Act*, the plat and survey would have completed in the grantees a perfect title to the land and everything contained in it, but Congress saw fit to place in the grant a reservation of mineral land, and the only method by which that reservation could be eliminated from the grant, and mineral lands, in fact, made to pass thereunder to grantees, if at all, would be by an express determination and decision by officers of the government, vested with authority to make such decision, that the land in question was non-mineral land, and the approval of a plat and survey following, and based upon such a decision. In this case, it is plain that no such decision was ever made. We have here the Land Department notified in advance of an intention to defraud the government by the location of a grant so that it would cover rich minerals in the mountains, and it will be noticed that the statement of ex-Governor Gilpin to Surveyor General Case of such intention was made before the appointment of Mr. Case to the office of Surveyor General; and that he, as an honest man, felt bound to communicate to the government which he represented his personal knowledge of this fraudulent intention on the part of the claimants, and the official acts of the department at Washington show that, until the final approval of the survey, with the

distinct reservation that it should not embrace mineral land, the department was at all times vigilant to prevent the passing of title to any mineral land under this attempted location. The brief official life of Mr. Case as Surveyor General may be another illustration of the folly of telling all one knows—especially about the Governor's intentions.

In a certain sense, the real question at issue between the parties was not passed on by the trial Court, as the Court did not find it necessary to determine the question of the authority of the officers of the Land Department to extend the grant by implication. The plaintiffs contend that although, by the Act of Congress, mineral land was forbidden to them, still, by the acts of the officers of the government, it had been determined that the land which they located was not mineral, and that such decision was final and conclusive upon every one. The defendant denied, first, that the officers had ever decided the land to be non-mineral, and, second, denied their power to so decide by implication only, but the Court very properly stopped at the first question presented, and finding, as a fact, that the Land Office had never decided the land to be non-mineral, and that it had carried the reservations of the Act into the approval of the survey and plat, determined the case upon that issue of fact and not upon the question of authority or want of authority under the law to enlarge the grant by a specific finding as to the mineral character of the

land. *The Act of Congress and the approved plat and survey constituted the sole muniments of title of the plaintiff, and in both the reservation is expressed.* The effect of this condition of the title (having a reservation) is stated by the Supreme Court of the United States in Barden vs. The Northern Pacific R. R. Co., 154 U. S., 288, a case in which the granting language of the Act is precisely the same as in this case, and the land described in precisely the same words, "*land not mineral.*"

The Act of Congress granting lands to The Northern Pacific Railroad Company was approved July 2, 1864. (13 Statutes, Chapter 217, page 365.)

The language of the third section is: "That there be, and hereby is, granted to The Northern Pacific Railroad Company, its successors and assigns, * * * every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railway line. * * *"

The grant thus made was accompanied by certain provisos or conditions, among them this: "That all mineral lands be, and the same are hereby excluded from the operations of this Act, and, in lieu thereof, a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road may be selected as above provided, and that the word 'mineral,' when it occurs in this Act, shall not be held to include iron or coal."

Provision was made in the Act for the filing of lists and plats of survey, and for the issuance from time to time, as the road was completed and certified, of patents from the United States. (Section 4 of said Act, 13 Statutes, Chapter 217, page 365.)

Without attempting to state at length the facts in the Barden case because it is fully done in the opinion from which we quote, we call the attention of this Court first to the rule of law declared by this Court with respect to the condition of the title under such a grant, in view of the reservation therein contained, when no patent had issued.

"And what was that title? It was of the lands which, at the time of the grant, were not reserved as minerals, and of the lands which, at the time of the location, had not been sold, reserved or to which a pre-emption or homestead right had not attached. If one were to sell land, reserving therefrom the minerals of gold or silver found therein, and tell the purchaser to take the surveyor and measure off the land, would it be urged or pretended that the moment the surveyor ascertained the boundaries of the land sold, the reservation of the minerals then undiscovered would be eliminated? Would anyone uphold the reasoning or the doctrine which would assert such a conclusion? And can any one see the difference between the case now before us and the case supposed? Not a word was said or suggested in the cases cited about the elimination of the reservation for that

cause, and not only in the cases cited by the plaintiff, but, in a multitude of other cases, almost without number, a like silence was observed. In none of them was it ever pretended that the ascertainment of the location of the lands granted operated to withdraw from the grant the reservation of the minerals then disclosed. *The grant did not exist without the exception of minerals therefrom*, and Congress has declared, in positive terms, that the Act shall not be construed to embrace them, and there is nothing in any of the cases cited in plaintiff's contention which indicates in the slightest degree that the original exception was subsequently qualified.

"It seems to us, as plain as language can make it, that the intention of Congress was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral. After the plaintiff had complied with all the conditions of the grant, performed every duty respecting it, and, among other things, that of definitely fixing the line of the route, its grant was still limited to odd sections which were not mineral at the time of the grant, and also to those which were not reserved, sold, granted or otherwise appropriated, and were free from pre-emption and other claims or rights at the time the line of the road was definitely fixed, and was coupled with the condition that all mineral lands were excluded from its operation, and that, in lieu thereof, a like quantity of unoccupied and unappropriated agricultural lands, in odd sec-

tions, nearest to the line of the road might be selected.

"There is, in our judgment, a fundamental mistake made by the plaintiff in the consideration of the grant. *Mineral lands were not conveyed, but by the grant itself and the subsequent resolution of Congress cited, were specifically reserved to the United States, and excepted from the operations of the grant. Therefore, they were not to be located at all, and if, in fact, located, they could not pass under the grant.* Mineral lands being absolutely reserved from the inception of the grant, Congress further provided that at the time of the location of the road other lands should be excepted, viz., those previously sold, reserved or to which a homestead or pre-emption right had attached."

Barden vs. Northern Pac. R. Co. 154 U. S., 288, 315, 316.

It is conceded that there was no authority at law for the issuance of a patent, conveying the lands by metes and bounds. Had there been, and the plaintiffs had received a patent in the usual form, without reservations, it would, under well settled rules, have carried all the title to all the land, including mineral, and would in itself have been a conclusive adjudication by the department that the land was not mineral.

"It is true that the patent has been issued in many cases without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly, by

officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government, until, by further legislation, a stricter regard to their duties in that respect can be enforced upon them. The fact remains that, under the law, the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the Land Department. Until such patent is issued defining the character of the land granted, and showing that it is non-mineral, it will not comply with the Act of Congress in which the grant before us was made to plaintiff. *The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands,* but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the Land Department charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and, as we have already said, in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title." (Barden vs. Northern Pac. R. Co., 154 U. S., 288–317.)

In the case at bar, by the force of the law, the plaintiffs were compelled to accept as their sole title the Act of Congress and the approved survey under it, in which respect this case differs from

many decided cases on similar subjects, and throughout that title the reservation of the Act was carried to the end.

In the first instance, the question of the mineral character of the land would seem to have been committed to the Surveyor General of Colorado, for his investigation and report—not for his final decision. Such is the language of the instructions of the Commissioner of the General Land Office, both to the Surveyor General of New Mexico and Colorado (pages 5–8), the language being that "*it is necessary, before the application can be approved* by this office, that it be accompanied by the certificates of the Surveyor General and the Register and Receiver, that the land selected is vacant and not mineral." These required certificates of the Surveyor General of Colorado and the Register and Receiver would seem to have been made on December 5, 1863. That of the Surveyor General was forwarded to the department at Washington, and was by the Commissioner *distinctly disapproved and returned.* (Printed record, page 8.) The other certificate—that of the Register and Receiver—so far as this record shows, never found any official lodgment in the records of the government, and, in fact, was not brought to the notice of the Surveyor General until *after he had approved the plat and survey*, being received by him fourteen days after such approval, and on March 29, 1864. (Printed record, page 11.) This record, now presented and relied

upon as title, shows no certificate from the Surveyor General of Colorado which has ever at any time received the approval of the Commissioner of the General Land Office. It is not true, as claimed by counsel, that the Surveyor General "located" this land, and that he could only have done so upon ascertaining that it was vacant land, not mineral, and within the territorial limits fixed by the granting Act. The proceedings had in the office of the Surveyor General of Colorado were, confessedly, outside of the law, were irregular, and were so declared by the Commissioner of the General Land Office, and the contract for the survey was expressly disapproved and the survey declared not to be an official one. (Printed record, page 9.) To save to the parties the expense of the survey, and to utilize it as a basis for action by the department, the Surveyor General was authorized to approve the said survey, irregular and without authority of law as it had been, upon certain prescribed and expressed conditions, chief of which was that in the certificate of approval of such survey there should be added the "special reservation stipulated by the statute—'but not to embrace mineral land.'" So that we have in this case, resting in the Surveyor General, a special and well defined authority coming from his superior officer, beyond which he could not go, and did not go, and there was not only no decision that this was non-mineral land, but, on the contrary, the rights of the

government in the lands included in the survey, as approved, were expressly reserved, should the survey as approved be found to contain mineral land. No other effect can be given to this reservation. If the approval of this survey, with this reservation of mineral land in it, means that by such approval all the land passed, whether it was mineral or not, then the exception is an idle phrase, without force or meaning. If, on the contrary, it means what it says, Gov. Gilpin took his title at his peril, knowing that in no event could such title embrace mineral land. Counsel call attention to the case of Rutherford vs. Greene's Heirs, 2 Wheat., 197, where it is held that the granting statute vested the title in Gen. Greene, and "that the survey made in pursuance of the Act gave precision to that title and attached it to the land surveyed." In that case there was no question of reservation, or quality, or character of the land. The Act making the grant in that case, as in this, was a grant *in praesenti* and only required the identification and segregation of the land to vest the title, but the vital difference is that in this case the grant was not applicable to all public lands, and could not be located upon mineral land.

It has always been the policy of the government to reserve mineral lands, and this Court has declared that mineral lands have been at all times, by the settled policy of the general government,

excluded from grants, and has made that policy a controlling feature in their construction.

Prior to 1866, there was no method under the law by which mineral lands could be conveyed by the general government other than by an Act of Congress

It had been a well known policy of the government of the United States, from the time of its foundation, to reserve from sale all lands containing minerals, or "known mines." This policy was not in any degree disturbed until the passage of the Act of 1866, known as the First Congressional Mining Act. (14 U. S. Stats., 251.) In 1850, the policy of the nation's selling the mines for the purpose of obtaining public revenue began to be discussed in the National Legislature. But, after much controversy, the arguments in favor of leaving the mines free and open for exploration and development prevailed, and adverse measures were defeated or abandoned. From that time until 1866, non-action was the policy of the government. Since July, 1866, all valuable mineral deposits in lands belonging to the United States have been free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase.

Rev. Stats., Sec. 2319.

"Very soon after the conquest of California and its cession to the United States by Mexico, it was found to be rich in the precious metals, and

such was the rapid influx of immigrants from the Eastern States that the California population at the time it was organized as a State in 1850 was largely composed of mining camps and settlements engaged in mining these metals. As nearly all those mines were discovered on land the title of which was vested by the treaty in the government of the United States, it became important to determine what course the government would take with regard to this new source of untold wealth. The Spanish government, to which this territory and much other, rich in precious metals, had once belonged, had instituted a system of laws concerning her mines by which private enterprise was invited to develop them, and a revenue secured at the same time to the crown, which made Spain for the time the richest of the civilized governments of the world. This system Mexico had inherited and perpetuated, and there were many American statesmen who believed that, with the territory, we had acquired the laws which governed the production of gold from the earth. Others believed that, whether this were so or not, it would be a wise policy for the government to secure to itself a fair proportion of the metal produced from its own ground. But, while Congress delayed and hesitated to act, the swarm of enterprising and industrious citizens filled the country, and, before a State could be organized, had become its dominating element, with wealth and numbers and claims which demanded consideration.

"Matters remained in this condition, with slight exception, until July 26, 1866, when Congress

passed a law by which title to mineral land might be acquired from the government at nominal prices, and by which the idea of a royalty on the product of the mines was forever relinquished. (14 Statutes, 251.)

"During this period, however, from 1849 to 1866, the system of the disposition of the public lands in general had to be introduced into California, and grants of land were made to the State for various purposes; also to railroad companies; and in all this the attention of Congress was necessarily turned to the distinction between mineral lands and the ordinary agricultural lands of the other Western States to which similar laws had applied. This distinction is nowhere more plainly manifested than in this Act of 1853. As we said in Sherman vs. Buick (93 U. S., 209), the main purpose of that Act was to provide for the survey and sale of the public lands and for the right of pre-emption to the settler on them, and there was embraced in this clause of pre-emption the grant of the sixteenth and thirty-sixth sections to the State for school purposes. In the very sentence which contains this grant in parentheses, and while introducing the new principle that the public lands should be subject to the right of pre-emption, whether surveyed or unsurveyed, the mineral lands are excepted, in express terms, from this right and from public sale.

"We say that this introduced a new principle in pre-emption law; for, except in a very few cases, no right of pre-emption had before existed until the lands were surveyed, so that the pre-emp-

tor could designate by the description of the congressional survey the precise land to which his pre-emption attached.

"But this right of premption on unsurveyed lands was by this statute to last but one year, and so careful was Congress to protect mineral lands from sale and pre-emption, that, as we have already shown by the proviso to Section 3 of the Act, the surveyors were forbidden to extend their surveys over them.

"The effect of this was as Congress intended it should be, that, as no surveys could be made of mineral lands until further order of Congress, there could be no sale, pre-emption, or other title acquired in mineral lands until Congress had provided by law for their disposition. The purpose of these provisions was undoubtedly to reserve these lands, so much more valuable than ordinary public lands, and the nature of which suggested a policy different from other lands in their disposal for such measures in this respect as the more matured wisdom of that body, which by the Constitution is authorized to dispose of the territory or other property of the United States, should afterwards devise.

"It is a strong corroboration of this view that Congress, in Section 12 of this same statute, giving the State seventy-two sections for a seminary of learning, declares that no mineral lands shall be taken under the grant, and makes the same reservation of its mineral lands in the grant for the erection of public buildings in the State.

"We find a similar provision in the grant to the Pacific Railroad Companies, whose road it was known would pass through some of these mineral regions. By the 4th section of the Act of 1864 (13 Statutes, 356) it is declared that neither that Act nor the Act of 1862 shall be held to include in the grant 'any government reservation of mineral lands or the improvements of any *bona fide* settler on any lands returned or denominated as mineral lands.'

"As we have already said, Congress, after keeping this matter in abeyance about sixteen years, enacted in 1866 a complete system for the sale and other regulation of its mineral lands, so totally different from that which governs other public lands as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States."

Mining Co. vs. Consolidated Mining Co., 102 U. S. 167-172.

On page 39 of counsel's brief, the position is taken "that there is absolutely no law or precedent which requires an affirmative approval, by the Commissioner of the General Land Office, of either the survey or the location. The authority of the Commissioner of the General Land Office in the premises rests only on the fact that he has general supervision and control, under the statute reorganizing the General Land Office, and in matters of controversy an appeal will lie to him. He has the right to veto, we may say, the action of the

Surveyor General, but in the absence of objection from the Commissioner of the General Land Office, after facts are called to his attention, the act of the Surveyor General is final and conclusive as the Act of the government." And the case of Frasher vs. O'Connor, 115 U. S., 102, is cited in support of this proposition. If this were true, which we deny, it would still be inapplicable to the case at bar, first, because the Commissioner of the General Land Office, by his various letters and instructions to the Surveyor General, had assumed to act, and to investigate and cause to be investigated the very matter in question, to wit, the mineral character of the land; and, second, because the authority given to the Surveyor General to approve the survey was special and limited in its character, and in the making of such approval no discretion was left to the Surveyor General, but the very form of his approval with reference to this reservation was directed by his superior officer. Counsel for plaintiff in error, on page 39 of their brief, make a statement which the record does not bear out. Counsel say that after a demand by the Commissioner for more evidence than had been originally produced, *and upon the furnishing of such evidence*, the Commissioner in terms authorized the Surveyor General to approve the plat and survey. For the italicized words above there is not a scintilla of support in the record. There is no proof whatever of any kind that any further

evidence as to the mineral character of the land was furnished either to the Surveyor General or to the Commissioner of the General Land Office, and the absence of any such evidence is shown by the reservation contained in the approval, because, if such evidence had been furnished, and it had been satisfactory and conclusive, there would have been no necessity for the reservation. Upon page 57 of counsel's brief, the above statement is substantially repeated, and it there appears that the claim that such evidence was furnished is drawn "by necessary deduction" from the fact that Governor Gilpin went personally to Washington. Counsel say: "We do know that he submitted sufficient to satisfy the Commissioner that the land was non-mineral," but as to how counsel know it, we are left entirely in the dark. Certainly, the record contains no evidence of that character, nor anything whatever to show that the Commissioner was satisfied that the land was non-mineral.

II.

Counsel's second proposition is that the proper officers of the government, after investigation of the facts, determined, in 1864, that the land in controversy was not mineral. This proposition, either as a fact deducible from the evidence or as a conclusion necessarily to be drawn from the record, we entirely dispute, and insist that the officers of the government did not determine prior to May 4,

1864, or at any other time, that the land in controversy was not mineral. Counsel for plaintiff in error devote many pages of their brief (pages 41-59) to answering the question, put by themselves, as to who was the proper officer to determine the character of the land on behalf of the government, and they reach the conclusion that the Surveyor General of Colorado was such officer. The cases cited by counsel with reference to the force and effect of surveys are almost without exception with reference to surveys which were provided for under Acts of Congress, general in their application, and but rarely with reference to specific grants. They are cases in which, in the ordinary course of business, without special or limited authority, the surveys in question had been made by officers of the government, and had been filed received and acted upon in the Land Offices of the government sometimes with and sometimes without the approval of the Commissioner of the General Land Office. In no case has there been a survey, in its inception confessedly irregular and without authority of law, given force and effect as a foundation for title, by reason solely of the approval of the Surveyor General. In the case at bar, the power of the Surveyor General in the premises was expressly defined and limited by his superior officer, the Commissioner of the General Land Office, by the letter of February 12, 1864 (record, page 10), as follows:

"The difficulty, however, may be avoided by pursuing the following course: The original field notes, duly verified and authenticated, must be filed in the Surveyor General's office of Colorado. Upon bringing these to the usual satisfactory tests, and finding the same all regular and correct, *you are authorized*, in virtue of the aforesaid 6th Section of the said Act of 21st June, 1860, *to approve the said survey, but in your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land* nor to interfere with any other vested rights, if such exist.

* * *

"Very respectfully, your obedient servant,

"J. M. EDMUNDS,

"*Commissioner.*"

Printed record, p. 10.

On page 41 of counsel's brief, what we deem an erroneous impression as to the view of the trial Court is given. The trial Court did not instruct the jury that there must be an express declaration by some officer of the Land Department in Washington that the land was not mineral. What the Court held was that there had been no determination of any kind that the land was mineral, not attempting to define or state the character of the acts, or the language in which a finding that the land was not mineral should have been expressed. It is plain, from the record, that the trial Court afforded to the plaintiff in error the utmost latitude of proof, admitting in evidence in support of this title not

only the original record upon which it was based, but all kinds and classes of public documents, regardless of whether they were prepared and published with any reference to the matter in controversy in this case or not, and throughout it all, with the single exception of the letter of Commissioner Williamson written in 1879 and the letters thereafter written by succeeding Commissioners, and based by their terms upon that letter, there is no reference whatever to the mineral or the non-mineral character of the land. We have already dicscussed the Williamson letter, and shown, as we think, that, in so far as it assumes to state that the question of the mineral character of the land had been passed upon sixteen years before, it was a simple misstatement of fact, and, being such, the conclusions based thereon must fall with it. Counsel lay great stress upon the statutory duties of the Surveyor General and upon decisions of the Supreme Court, which, in one form or another, have recognized the force and validity of surveys approved by that officer. In the Barden case, 154 U. S., 288, already cited, a like claim of ownership was made of mineral land, because the plat of a survey, including the lands in controversy, had been filed in the local Land Office and duly approved, which survey reported such lands as agricultural and not mineral, and which stood unchallenged from 1868 until 1888, when it was claimed that certain veins and lodes of mineral had been discovered in the

lands, and the claim was made, as in this case, that the filing and acceptance of such plat and survey was a determination by the government that the land was agricultural and not mineral and was conclusive upon all parties. The Barden case upon the facts is much stronger in favor of the plaintiff than the case at bar as to the effect of the survey, because in that case there was no express reservation of the conditions of the Act, but, nevertheless, in passing upon that claim, this Court says:

"Some weight is sought to be given by counsel of the plaintiff to the allegation that the lands in controversy are included in the section which was surveyed in 1868, and a plat thereof filed by the Surveyor in the local Land Office in September of that year, from which it is asserted that the character of the land was ascertained and determined, and reported to be agricultural, and not mineral. But the conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the Surveyor General. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted, or make any binding report thereon. Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties, but they are not clothed with authority to especially examine as to these matters ontside of their other duties, or determine them, nor does their report have any binding force.

It is simply an addition made to the general information obtained from different sources on the subject. In Cole vs. Markley, 2 Dec. Dep. Int., 847-849, Mr. Teller, when Secretary of the Interior, in a communication to the Commissioner of the General Land Office, speaks at large of the public notations of Surveyors, and says: 'Public and official information was the object of these notations, with a view to preventing entry until the facts are finally determined. They should be, and they are, only *prima facie* evidence, and subject to be rebutted by satisfactory proof of the real character of the land.' The determination of the character of the land granted by Congress, in any case—whether agricultural or mineral or swamp or timber land—is placed in the officers of the Land Department, whose action is subject to the revision of the Commissioner of the General Land Office, and, on appeal from him, by the Secretary of the Interior. *Under their direction and supervision, the actual character of the land may be determined and fully established.* The effect of a patent issued by them under the authority of Congress as to such matters we shall presently consider. In the present case, the mineral character of the lands in controversy is conceded. They are alleged in the complaint to be mineral lands containing gold and silver and precious metals."

Barden vs. Northern P. R. Co., 154 U. S., 288, 320.

Counsel having established to their own satisfaction that the Surveyor General had authority

to determine the land to be non-mineral, it then becomes necessary for them to aver and prove that he did so determine. We think the record shows that this claim is without foundation. The only certificate as to the non-mineral character of the land made by the Surveyor General was distinctly disapproved by the Commissioner of the General Land Office, and the evidence upon which the certificate was made, held to be insufficient. (Printed record, page 8.) There is not the slightest proof that any further evidence was ever submitted to the Surveyor General, or the question in any form passed upon by him, and but a very brief period of time—only a few days, at the utmost—could have elapsed, considering the distance and the means of communication between Washington and Denver in those early days, between the receipt by the Surveyor General of the letter disapproving his certificate and the date of his approval of the plat and survey under the special authority conferred on him of approving it, subject to the reservation contained in the Act, "but not to embrace mineral land." When the Surveyor General endorsed his approval on the plat and survey, he had no notice or knowledge of the certificate of the Register and Receiver, as it did not reach him until two weeks after his approval was made. If inferences are to be indulged, they are all against any presumption that the Surveyor General received further evidence or made

any other decision or certificate. From the date of his first certificate in December, 1863, until his final approval of the plat on March 18, 1864, it is apparent that the lands in controversy were wholly inaccessible, by reason of the snows, to say nothing of the fact that the report of the Deputy Surveyor and the original survey itself, as approved by the Surveyor General, show that the very lands in controversy embraced within so much of the grounds as would be included within the east two and one-half miles of the north boundary and the north six and one-half miles of the east boundary of the grant were inaccessible at all times, in the opinion of the Deputy Surveyor, and if any presumption arises upon the record, it is that both the Surveyor General and the Register and Receiver were certifying to matters as to which they could in the nature of things have had no proper or sufficient knowledge. Counsel, in their brief, several times claim that further evidence was submitted, but they nowhere state what it was, or where it is to be found in the record.

III.

The third proposition of counsel is that "No subsequent discovery of mineral could divest the title derived through the grant made by Congress to the heirs of Baca, or exclude therefrom any portion of the surveyed premises." This proposition requires but little discussion. Until patent is issued, the mineral character of the lands remains

open for adjudication. Such is the direct holding of this Court in the case of Barden vs. Northern P. R. Co., 154 U. S., 288. The question whether the lands were known to be mineral at the time of the grant or not becomes wholly immaterial under that decision. For a time, a line of authorities existed in seeming contradiction to the rule there declared and the decision of Judge Sawyer in the case of Northern Pacific Railroad Company vs. Barden, 46 Federal, 592, was quite generally accepted as conclusive of the determination that only such mineral lands were excepted from a grant of lands "not mineral" as were "known" to be mineral lands at the time of the grant. The reversal of that case, however, by this Court, has finally established the contrary doctrine as the true one. Counsel, however, adhere, in their brief, to the rule as it existed before the Barden case. We have already quoted the language of the Supreme Court upon this question and refrain from further citation, but we ask of this Court a careful consideration of the whole of the Barden case in connection with this record.

In their conclusion, counsel lay great stress upon and at length requote the entire Williamson letter of 1879. If the letter had correctly stated the law and the facts, this case would have had no existence, but as to this letter we ask the Court to carefully notice that it assumes as a fact the vital point in this case. It assumes a determination by

the Surveyor General which the record shows he never made. It was written in 1879, on an *ex parte* application, sixteen years after the approval of the survey, and several years after the northeast corner of this grant had been covered with prospectors diligently searching for and finding mineral lands. It was written upon the application of the then owners of this grant, without notice to any other claimants, or any investigation of the facts as to the mineral or non-mineral character of the land and three years after the mining claim in controversy here was located. It was in no sense a decision after a hearing. It is given prominence by counsel because it constitutes almost their sole reliance in this case, as being the only official statement for thirty years that these lands were, in fact, non-mineral.

Throughout their entire brief, counsel repeatedly urge that because Commissioner Edmunds on May 4, 1864, acknowledged the receipt of the approved plat and survey "without objection" and then "made no objection" to such approval, that the act of the Surveyor General became final and conclusive as the act of the government. We concur with counsel in that proposition. When the plat and survey was approved by the Surveyor General, in pursuance of the express directions of the Commissioner, and the reservation and exception of the grant perpetuated and redeclared in the approval, it left nothing for the Commissioner

upon that question, to object to, and there was no reason why he should object. The approved plat, under the declared rules, both of law and the department, was to constitute the sole evidence of title. The Commissioner had expressly directed that in the certificate of approval "the special reservation stipulated by the statute but not to embrace mineral land," should be inserted, and it had been done. The interests of the government had been protected, the grantee laying aside his desire to "cover rich minerals in the mountains," had accepted, as his sole muniment of title, an approved plat containing such express reservation of mineral land. The work of the Commissioner was not only done, but well done, and it was left for sixteen years in that condition.

Questions Submitted.

The United States Circuit Court of Appeals for the Eighth Circuit submits to this Court three questions for answer:

First—(1) Was the action of the Commissioner of the General Land Office, or of the Surveyor General of Colorado, in 1863 and 1864, evidenced by the foregoing certificates and communications, a decision by the proper officer that none of the lands in said Baca Grant No. 4 were mineral lands? and

"(2) A valid location upon the ground covered by said grant of the selection of that tract by

the heirs of Baca, under Section 6 of the 'Act to confirm certain private land claims in the territory of New Mexico,' approved June 21, 1860 (12 Statutes, 72); or

"(3) Was the action of these officers a refusal to decide that question? and

"(4) Either an attempted or actual location of the selection of said heirs, on that part only of the land described as Baca Grant No. 4, which should not, any time in the then future, be found to be mineral land?"

The defendant in error contends that this question should be answered as follows:

To clause (1), "No"; to clause (2), "Yes, reserving mineral land"; to clause 3, "Yes"; to clause (4) "Yes."

"*Second*—Was the title to that portion of the lands decribed as Baca Grant No. 4, which is in controversy in this cause, and which was mineral land, but which was not known to be mineral land until 1876, vested in the heirs of Baca and their successors in interest, by the said Act of Congress and the action of the Commissioners of the General Land Office and of the Surveyor General, evidenced by the foregoing certificates and communications?"

We maintain that this should be answered "No."

"*Third*—Was the direction of the Circuit Court to the jury, to return a verdict for the defendant in this case, right?"

We maintain that the answer to this inquiry should be "Yes."

Conclusion.

Throughout this brief, we have carefully limited ourselves to the record certified up from the United States Circuit Court of Appeals, and not referred to the more ample record from the trial Court. The certified record gives but little or no idea of the present situation with respect to this grant and the mines thereon. Counsel for plaintiffs in error, however, in their conclusion, submit some inferences, rather than statements, which ought not to go unchallenged. It is obvious that the equities of the parties, whatever they may be, do not enter into this record or into the case itself. It is purely a question of legal right. If, following counsel in the closing paragraphs of their brief, we should attempt to consider or discuss the equities which they suggest as arising in this case, we would enter upon a field the extent and nature of which is undisclosed by this record. Instead of a "level tract" of country, we would find the northeast corner actually crossing the Sangre de Cristo Mountains at an altitude of more than 13,000 feet. We would find, and the trial record shows, that for thirty years eleven and one-half miles of the north-

ern and eastern lines of this grant remained unsurveyed, unlocated and unmarked, because of the inaccessible character of the ground. We would find a grant whose actual boundaries on the ground were unknown to its owner, sixteen years after the mine in controversy in this case was located.

We would find a great number of miners and prospectors liable to be dispossessed of the holdings and the labor of years, and compelled to remove from the homes where their children have been born and reared to manhood. We would find that thriving communities, with whose ultimate prosperity the grant owners themselves are deeply concerned, would be driven out and dispossessed. But this is an action of ejectment in which the plaintiff must recover upon the strength of his own title.

He comes into court saying this is mineral land which he owns under a grant excluding mineral land, and surveyed and located by a plat and survey which in terms excluded mineral land, and produces such grant and plat as his sole title.

"The action being for the possession of lands conceded to be mineral, under the Act of Congress of July 2, 1864, it would seem that the simple reading of the granting clause and its proviso, and the joint resolution mentioned, would be a sufficient answer to the complaint."

Barden vs. Northern Pac. R., 154 U. S., 288, 312.

We therefore ask for such answers and directions to the Court below as will affirm the decision of the trial Court.

JOHN R. SMITH,
Attorney for Defendant in Error.

FILED
FEB 18 1898
JAMES H. McKENNEY,
CLE

No. 154.

Brief of Smith for D. E.

Filed Feb. 18, 1898.

IN THE SUPREME COURT OF THE UNITED STATES.

QUINCY A. SHAW,
Plaintiff in Error,
vs.
MURRAY M. KELLOGG,
Defendant in Error.

No. 154.
(16252.)

Supplemental Brief for Defendant in Error.

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No. 154.
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Supplemental Brief for Defendant in Error.

In response to the supplemental brief and argument filed for plaintiff in error, and by leave of Court, we herewith present this additional brief, with special reference to the statements made in the supplemental brief for plaintiff in error, and by reason of the filing in this Court of the complete record of the case. The record references in this brief are to the printed record in this Court. Those in our first brief refer to the pages of the certificate heretofore printed in this Court, said certificate being reprinted on pages 160 to 182 of the complete record.

Counsel for plaintiff in error, in their supplemental brief, present what they call a chronological statement of the facts shown by the record. In such statement we believe there are material errors and omissions, rendering the statement mis-

leading, and giving a very one-sided view of the questions to be determined by this Court. The method of such statement, however, seems a proper one to follow.

Before entering upon a review of it, we desire to call the Court's attention to the fact that this case was determined in the trial Court upon the proofs offered by the plaintiff alone; that no proof was offered or required on behalf of the defendant, and that for this reason there are a number of matters of minor importance now magnified by counsel, which would obviously have been fully met and contradicted or explained had defendant's case been gone into. In no instance do such matters go to the vital questions in the case, but are all used by way of involving so-called equities in favor of the plaintiff in this legal action of ejectment.

The complete transcript of record brought into this Court by its writ of certiorari does not present, as we view it, any new questions of law, as applicable to the record title of the plaintiff in error, to Baca Grant Number 4, but it does present all the facts surrounding the inception and creation of that title, so far as the most diligent effort of counsel, taking ample time for preparation, could procure them, and we ask of this Court that the record title upon which plaintiff must stand or fall shall be weighed and determined in the light of all these facts, because the grant—the act of Congress of June 21, 1860—was not only a grant, but was a law, binding alike upon grantor and grantee, and to be faithfully kept and observed

by both parties, and if such law ws not so observed and the record presented by plaintiff shall prove such to be the case, we shall confidently ask of this Court an affirmance of the judgment below in our favor.

I.

The Record Title.

June 21, 1860. Act of Congress, declaring it lawful for the Baca heirs to select a quantity of vacant land not mineral, to be located by them in square bodies not exceeding five in number, directing the Surveyor General to make survey and location of the lands so selected when required by the Baca heirs. "The right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act and no longer." (Record, page 28.)

Feb. 17, 1862. Enter Gov. Gilpin. On this date, John S. Watts conveys one of the five grants to William Gilpin. (Record, page 60.)

Dec. 12, 1862. Watts files the so-called selection of Grant No. 4, as attorney for Baca heirs. (Record, page 32.) The boundaries of such selection rest wholly upon the ascertainment of "a point on the eastern edge of the Valley of San Luis where the thirty-eighth parallel of north latitude crosses the base of the Snowy Range, dividing the waters of the rivers Arkansas and Del Norte." The land is stated to be vacant and not mineral and to be located for purposes of arable and pastural agriculture. This selection, though nominally made by Watts, was plainly

under Gov. Gilpin's direction, as he had bought it nearly a year before.

Feb. 5, 1863. Surveyor General of New Mexico certifies to the filing of such selection by Watts, and to its number and acreage. (Record, page 31.)

Feb. 24, 1863. Surveyor General Case reports the receipt of a copy of the Watts selection of December 12, 1862, and states the description as "beginning at a point (?) where the thirty-eighth parallel of north latitude crosses the base of the Snowy Range," etc., and then adds: "I suppose this selection has been made by ex-Gov. Gilpin, as he told me last summer he was in possession of one of the Baca 'floats,' and should locate it as this is located for the reason that, in his opinion, it would cover rich minerals in the mountains." (Record, pages 32 and 33.)

March 13, 1863. Commissioner Wilson acknowledges receipt of Surveyor General Case's letter of February 24, 1863; states that before the application can be approved, it must be accompanied by the certificates of the Surveyor General and the Register and Receiver that the land selected is vacant and not mineral; that the character of the location as to minerals must be carefully ascertained, especially after the important statement of Gov. Gilpin, communicated in such official letter. (Record, page 33.)

At this point the record is complete as to everything which had been done within the three

years limited by the Act of Congress, and it clearly appears that the only act done by or on behalf of the Baca heirs within that time was the filing of the so-called selection of December 12, 1862, and that the only possible identification of the land selected rested absolutely upon the designation, either by parties interested or by the Government, of a point where the thirty-eighth parallel of north latitude crossed the base of the Snowy Range, and we insisted upon the trial, and we insist now, that so indefinite a description did not select the land, did not, and could not, in the nature of things, charge the Government or the public with knowledge of its location, or enable either the Government or the parties to ascertain and determine whether the lands were either vacant or non-mineral. We shall recur to this later on.

Oct. 3, 1863. Gov. Gilpin makes application for survey of Grant No. 4. Surveyor General's letter (page 34) shows that the public surveys had not been extended near this land, and would not be for some time to come. It was also stated that in case of the non-approval of the contract with the deputy surveyor, the survey would be considered private, and not official; and November 2, 1863, Commissioner Edmunds expressly disapproves the contract with Deputy Surveyor Sheldon. In the meantime, the survey had been made, being completed on November 4, 1863. The date referred to in the Commissioner's letter, "13th

March, 1860" (record, page 35), is an obvious misprint, and should be "13th March, 1863." (See record, page 33.)

Dec. 5, 1863. Two certificates of the non-mineral character of this land were made similar in form, one signed by Surveyor General Pierce, and one by the Register and Receiver of the Land Office. The first of these certificates was transmitted to Commissioner Edmunds on December 12, 1863; the other certificate by the Register and Receiver does not appear in the case until February 26, 1864 (record, page 39), and was not received by the Surveyor General until March 29, 1864 (record, page 52), which was two weeks after the qualified approval of the plat and survey.

Jan. 16, 1864. The non-mineral certificate of the Surveyor General was on this date expressly disapproved (record, page 37), and his reasons for making it expressly declared insufficient.

Feb. 12, 1864. Commissioner Edmunds authorizes the qualified approval of the plat and survey. (Record, page 38.) "The original field notes duly verified and authenticated must be filed in the Surveyor General's office at Colorado. Upon bringing these to the usual satisfactory tests and finding the same all regular and correct, you are authorized, in virtue of the aforesaid sixth section of the said act of the 21st June, 1860, to approve the said survey, but in this certificate of approval you will add the special reservation stipulated by the statute—but not to embrace min-

eral land—nor to interfere with any other vested rights, if such exist. The statute does not order the issue of the patent. The aforesaid law of 21st June, 1860, with your plat approved in the manner indicated, will, therefore, constitute the evidence of title."

May 4, 1864. Commissioner Edmunds acknowledges receipt of transcript and field notes of the survey of grant No. 4. (Record, page 53.)

May 1, 1864. The Baca heirs convey to John S. Watts. (Record, pages 53-59.)

Nov. 6, 1877. Conveyance from Watts to Gilpin under decree of Court pursuant to the contract of February 17, 1862. (Record, pages 60-66.)

Dec. 10, 1883. Deed from William Gilpin to George H. Adams. (Record, pages 67-69.) This deed recognizes the existence of the mining property in controversy known as the "Eastern Star Lode" and of other mining properties. (Record, page 68.)

March 15, 1887. Deed from George H. Adams to Quincy A. Shaw, plaintiff in error, (record, pages 70 and 71.) This deed also recognizes the existence of the mining property in controversy by name and reference to an outstanding leasehold interest therein.

II.

Facts Relating to the Occupancy of Baca Grant No. 4.

—— **1869.** There is not the slightest evidence in the record of any use, or occupation of

this grant for pastural or agricultural purposes, by the grantors of plaintiff in error or any one else, prior to 1869. In 1874 some portion of the land would seem to have been leased for ranch purposes (record, page 75), and since that date the witness George H. Adams, a former owner, has resided thereon either as lessee, owner or manager.

—— **1876.** A considerable number of miners are prospecting and mining in the mountains and upon this ground. At this time the exterior lines of the grant for two miles and a half at the east end of the north line, and eight miles and a half at the north end of the east line had not been run, marked or surveyed, nor had the grant been fenced, and no one, including the occupant Adams, knew where the true lines of the grant were. As early, at least, as 1876, the evidence shows a considerable number of miners on the grant, and the Eastern Star Mine was located by three locators in April, 1876. (Record, pages 9–80–81.)

1876–1893. The possession has at all times been concurrent by the miners and the grant claimants from 1876 to the institution of this suit, the miners holding the mineral land and the grant owners the pastural and arable land. (Record, pages 74–77.)

Taxes. By the payment of local taxes, the plaintiff in error has been enabled to retain possession of almost this entire grant and of all the agricultural, pastural and arable land thereon, and to appropriate all the income and profits therefrom.

III.

Facts Relating to the Possession of the Eastern Star Mine Since 1876.

April 24, 1876. Date of discovery, as shown by location certificate. (Record, page 8.)

It is obviously unfair to assume to give a summary, or any, statement of the rights of defendant in error in the Eastern Star Mine upon this record, for the reason that such rights have not been tried, heard or determined or any testimony been called for with respect to them. This is an action of ejectment, resting on the strength of plaintiff's title, and judgment for the defendant was entered on plaintiff's proof for want of title in the plaintiff, at both trials.

The record (page 9) in the verified answer of defendant shows that instead of the property being abandoned, it has been in the continuous possession of the locators or their successors in interest to the present time, and that at least $100 worth of labor or improvements have been made or performed on said mine, in each and every year from 1876 until the present time, and when the annual labor is performed, there is and can be no abandonment in the legal sense, whether there is actual possession continuously during all the time or not, and plaintiff's own testimony shows that when not being worked, the mine has been kept locked up by defendant in error. (Record, pages, 75 and 85.)

On page 6 of the supplemental brief for plaintiff in error, it is stated that in 1885 this property

was abandoned by the lessee, and that in 1887 a verbal lease was granted to defendant in error Kellogg, and that in 1888 a second lease was refused, and that thereafter the property was invaded and plaintiff ousted. The record, on the contrary (pages 73 and 74), shows by the evidence of the witness Adams himself that the property leased was not the mine, but was a stamp mill which had been for many years before that time upon the grant, and which had been turned over to Mr. Adams, and there is not the slightest warrant in the record for the statement that these so-called leases related to the Eastern Star Mine.

IV.

As to the Mineral or Non-Mineral Character of the Land in Controversy.

Dec. 12, 1862. The statements of John S. Watts for the Baca heirs states that the land is "not mineral." (Record, page 32.) At this time, Gov. Gilpin was the owner of the grant, had contracted to purchase it on February 17, 1862, and the Watts selection of December 12, 1862, was obviously made under his direction and in his interest. Before the selection was made, Gov. Gilpin had stated to Surveyor General Case that he was "in possession of one of the Baca 'floats,' and should locate it as this is located for the reason that, in his opinion, it would cover rich minerals in the mountains." (Record, page 33.)

Feb. 24, 1863. Surveyor General Case officially notifies Commissioner Edmunds of the state-

ment above quoted, made to him by Gov. Gilpin, as being made *last summer*, the summer of 1862.

Nov. 28, 1863. Surveyor Sheldon reports that he saw no indications of the precious metals. (Record, page 50.) The Sheldon survey was made in twelve days—October 22 to November 4, 1863. (Record, pages 39–49.) It was made under Gov. Gilpin's personal supervision. In that time three men ran thirty-nine and one-half of exterior lines in the winter, with their work rendered incomplete by heavy snows, and set half-mile posts along such exterior lines, with pits, mounds and stakes, and they obviously had no time to look for precious metals if they desired to do so.

Dec. 5, 1863. The Register and Receiver and the Surveyor General certify that the land is not mineral. (Record, pages 35 and 36.) We have already stated the facts about these certificates. That of the Surveyor General was expressly disapproved January 16, 1864, and no further one made or approved and the other was not received or seen by the Surveyor General until long after he had approved the plat. No Surveyor General has ever certified that this land is non-mineral, and such certificate, after due and proper proof, was made an essential requirement of the passing of title from the Government, from the first letter of July 26, 1860 (record, page 30), down to the final approval of the plat under the authority of the letter of February 12, 1864.

V.

Did the Land Department Adjudicate, in 1864, the Question Whether the Land Selected was Non-Mineral Land?

This is a question of fact. We have discussed it upon the record quite fully in our former brief, but the ingenious selection of acts and phrases made by counsel for plaintiff in error in subdivision 5 of their supplemental brief demands its re-examination. A conclusive answer to the question would seem, under the ordinary rules of language, to be found in the final instruction from the Commissioner of the General Land Office in his letter of February 12, 1864, by which the Surveyor General was authorized to approve the plat and survey, and therein instructed to insert "the special reservation stipulated by the statute—but not to embrace mineral land."

This letter does more than show what the Commissioner's decision was as to the thing which should be done, because it also clearly shows what the Commissioner's construction of the statute was at that time and constitutes not only an answer to the proposition so strenuously urged that the Land Department then determined this land to be non-mineral, but is also an answer to the oft repeated suggestion throughout the case, that the Commissioner must have construed the statute to refer only to known mineral land. The Commissioner expressly names it as a reservation and treats it not as a question to be adjudged by the Department, but as a reservation to be enforced

in the absence of the conclusive proof which had been before that time called for by him. If such proof had been furnished, and the question in fact adjudicated, there could certainly be no reason for inserting in the document which he then declares to be plaintiff's evidence of title, the special reservation stipulated by the statute, "but not to embrace mineral land." If any adjudication can be drawn by inference from these final acts constituting the evidence of title, it is, on the contrary, an adjudication that such facts as had come to the knowledge of the Department disclosed within that area the existence of mineral lands, and that, therefore, the Commissioner felt it to be his duty, if the approval of the plat was allowed at all, to allow it only with the express reservation stipulated by the statute. The matter was plainly dealt with by the Commissioner and such decision as he made was plainly made and the authority which he gave was plainly given, because of his being advised, and it having appeared that within the area claimed there was mineral land. He had no control over the applicants, could make no selection for them, could do nothing under the law but survey and locate the lands pointed out to him by the Baca heirs, but what he could, and did do, was to put into their evidence of title the special reservation stipulated by the statute, that such title should not embrace mineral land, and they were charged from that time on with notice of such reservation.

Counsel for plaintiff in error argue that because the right of selection on the part of the

Baca heirs was limited to three years, such period was clearly allowed, both for the purpose of enabling the grantees to find vacant and non-mineral land which they could take under the act, and also to operate as a limitation upon the Government, requiring them to determine within such three years whether the land so selected was of the character which could be taken, and that if it was within three years found to be vacant and not mineral, the title should pass absolutely to the grantees. If such be the true construction of the law, the representatives of the Baca heirs succeeded in completely defeating its operation. During the three years next after June 21, 1860, the only act done by them or in their behalf was the filing on December 12, 1862, of the so-called selection. (Record, page 32.) Had such selection been definite and certain, it would have left to the Government but six months in which to ascertain and determine the character of the land. But, in fact, it did not designate with even reasonable certainty the portion of the public domain which it was intended to take. Even assuming the starting point—the base of the Snowy Range—to be a definite and certain point, the land selected for a distance of four and a half miles east from that point would necessarily lie up and upon the side of a range of mountains, and was selected in winter, far outside of the lines of the existing public surveys, in territory which, so far as the record shows, had not been explored or reported upon by any Government authority, and, at the very best, the time and character of such selection could have

left to the Government but a few short weeks after the departure of the winter snows in which to ascertain and determine the character of the land. But we insist that this question goes deeper than that and cuts to the root of the title claimed by plaintiff in error. The only rights which the Baca heirs could have, rested under the statute upon a definite selection of the lands by them within three years.

By the act of Congress of June 21, 1860, the right granted to the heirs of Baca was to "continue in force during three years from the passage of this act and no longer." The right granted was "to select, instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number." If exercised at all, this right to select was exercised by the filing with the Surveyor General of New Mexico, on February 5, 1863, on an application by John S. Watts, as the attorney of said heirs, dated December 12, 1862, and stating that he has "this day selected" a tract of land, described as follows:

"Beginning at a point on the eastern edge of the Valley of San Luis, *where the thirty-eighth parallel of north latitude crosses the base of the Snowy Range, dividing the waters of the Rivers Arkansas and Del Norte;* thence east along said parallel four and one-half miles; thence south along a meridian line twelve miles, thirty-six (chains) and forty-four links distance; thence west at a right angle twelve miles, thirty-six chains and forty four links distance; thence north to the said specified parallel of latitude; thence east with said parallel to the place of beginning."

To the introduction of this application as a part of the evidence on behalf of plaintiff, counsel objected, basing such objection upon the ground that the so-called selection of the land was void for the reason that the initial corner, as the "base of the range" was not a sufficient description to identify the land, and that no further acts of identification of any kind or nature were had or done within the three years limit provided by the act of Congress.

It is conceded by counsel for plaintiff in error that the above quoted selection of December 12, 1862, filed February 9, 1863, is the only act or thing done under said act of Congress within the three years, and we now insist that the said selection did not select, because it did not identify, with any degree of certainty whatever, the land selected. The initial point is wholly indefinite. The intersection of a parallel of latitude with the base of the Snowy Range can no more furnish, with certainty, a starting point for a tract twelve and one-half miles square, than it can for a town lot, and the proof in the case, and contained in the record, conclusively shows that the base of the range, if the beginning of an abrupt ascent is to be taken as such base, is at least a mile and one-half further into the mountain than where the initial corner, in fact, is, and that going east upon the thirty-eighth parallel, into the mountains, the ascending grade for 6,000 feet, and upwards, is actually less than it is to the west of the initial corner. (Record, pages 121, 139.) It is a familiar principle that an act of Congress granting land is to be strictly

construed against the grantee, and that there must be strict compliance with its requirements, and an ample period was afforded to the heirs of Baca to select and designate their land upon the ground, so that all the world might, within the three years provided by law, know what lands they had selected. The Commissioner of the General Land Office, in transmitting to the Surveyor General of New Mexico, in July, 1860, official information of the act of Congress, and his duties under it, plainly stated the duty of the Baca claimants in this regard. He said: "Should the Baca claimants select outside of the existing surveys, they must give such distinct descriptions and connection with natural objects in their applications, to be filed in your office, as will enable the Deputy Surveyor, when he may reach the vicinity of such selections, in the regular progress of the surveys, to have the selections adjusted, as near as may be, to the lines of the public surveys which may hereafter be established in the region of those selections." (Record, page 29.) This plainly contemplated just what the act contemplated—a selection and identification of the lands within three years, not necessarily a marking of the boundaries upon the ground, or a completed survey, but such a definite starting point of their description as should make it a matter of official record, ascertainable by any person concerned in locating or purchasing public lands, and it was a limitation and a requirement, entering into the grant itself, and of the very essence of it, that within the three years the

Baca claimants should select the lands which they desired to take under the grant.

In a line of cases in the Supreme Court of the United States, arising under entries made upon military warrants, this Court was called upon to pass upon the sufficiency of the descriptions used in the entry papers for lands, and, in discussing this question, the Court said:

"It has been long and well established, as a rule of law and equity, that a party must recover on the strength of his own title, and not on the weakness of his adversary's title.

"In order to uphold and support an entry, it is incumbent on the party claiming under it to show that the objects called for in it are so sufficiently described, or so notorious, that others, by using reasonable diligence, could readily find them."

Watts vs. Lindsey's Heirs, 7 Wheat., 159.

In the case of Meredith vs. Picket, 9 Wheat., 572, the Court declared:

"That the attempt of the appellees to explain their entry and to support their survey, by depositions, cannot avail them. It is the proper province of testimony to show the notoriety and names of places, but not to explain a written instrument—that is the proper province of the Court, according to their own opinion of the words as they are found in the instrument itself, and not according to the opinion of witnesses, who may or may not be selected for the purpose."

Meredith vs. Picket, 9 Wheat., 572.

In Taylor vs. Owing, 11 Wheat., 228, the Supreme Court says:

"It is the plain dictate of good sense that an entry, to satisfy the law, must describe the place with sufficient accuracy to be found and known by others, *and in terms which will not fit other places equally well* with that intended to be appropriated."

And in Bodley vs. Taylor, 5 Cranch, 190, the Court, while sustaining the entry, declares that "the law has required, and should be content with,

that reasonable certainty which would enable a subsequent locator, by the exercise of a due degree of judgment and diligence, to locate his own lands on the adjacent residuum."

We submit that, tested by these rules and by the well settled general rules of law requiring definiteness of description, the initial point of this so-called selection was so indefinite as to furnish no notice whatever to any person of the location of the lands so selected, and, taken in connection with the conceded fact that for twenty-nine years the lines of the survey upon the ground, to the extent of eleven miles of said grant, remained wholly unclosed, unmarked, and never, in fact, surveyed, amply warrants the Court in holding that the indefiniteness of the original survey was not aided by any subsequent acts as against miners and other claimants, whose rights arose in the intervening period.

In Schulenburg vs. Harriman, 21 Wall., 62, Justice Field states the rule that "A legislative grant operates as a law, as well as the transfer of the property, and has such force as the intent of the Legislature requires." And obviously in this case the act of Congress was not only a grant to the Baca heirs, but constituted the rule of law absolutely governing their action and measuring their rights.

Giving to the "location" the broadest meaning claimed for it by plaintiff in error, and making it refer solely to the acts of the Surveyor General, it would still remain true that, under the law, the only right of selection was in the Baca heirs, and

that the duties of the Surveyor General were limited to the location of the lands selected by them. The Surveyor General could only survey and locate such lands as the Baca heirs selected, and the period within which such survey and location was to be made was in no wise limited by the act. When the selection was once properly made, and the land designated by the Baca heirs, the survey of the land might have been delayed for an indefinite period, and, in fact, the instruction to the Surveyor General, under date of July 26, 1860, and June 7, 1862 (Record, p. 34), plainly contemplated that the selection by the Baca heirs would be so definite and certain, that the adjustment of the exterior lines to the public surveys should not be made until the vicinity was reached, in the regular progress of the surveys, the act of Congress authorizing the Baca heirs to request a special survey, but not limiting the time within which they might require it. It seems plain, under this state of facts, that the selection by the Baca heirs must not only have been made within the three years, but must also have been of a certain, definite and specific tract of land while the only selection made stated the initial point as at "the base of the Snowy Range," which we insist to be far too indefinite and uncertain to identify the land.

As was remarked by Judge Hallett on the first trial of this case, it was sought in the progress of the Pacific Railroad grant cases to definitely ascertain the base of the Rocky Mountains as a point at which the grant was enlarged, and expert testimony fixed such point at various places for a

distance of one hundred and fifty miles along the line of the road.

VI.

The So-called Adjudication in the Land Office that the Title to Baca Grant No. 4 Had Passed From the Government.

The citations under the sixth subdivision of the supplemental brief of counsel for plaintiff in error rest wholly upon the letter of Commissioner Williamson, written March 21, 1879 fifteen years after the qualified approval of the plat and survey. It is the first official statement that the question as to the mineral or non-mineral character of the land has been passed upon. It was not a decision upon any application for a determination of the mineral or non-mineral character of the land, nor was there any hearing with respect thereto, or any notice to third parties, or any consideration for their rights. The letter was wholly *ex parte* and merely the opinion of the Commissioner as to the legal effect of what had happened fifteen years before, and what is of still more importance, was based upon an obvious mistake of fact, in stating as a fact that the mineral or non-mineral character of this land had been passed upon.

The second letter referred to by counsel (record, page 104) adds nothing to the letter of Commissioner Williamson because it is wholly based thereon and merely adopts the conclusions and statements of that letter. The record does show by its silence that no attempt has been at any time made by the claimants of the grant to have

the mineral or non-mineral character of the land determined by the Department. Since 1876, at least, it has been well known to be partly mineral land. During all that time since their selection, the doors of the Department have been open to them for a hearing and decision, and the Department has constantly held that it had the power and authority under this identical act to order a hearing upon that question and to make such examination and decision. The force and effect of the words in the act, "vacant land, not mineral," have been before the Department, and repeated decisions have construed the same in the line of our contention, until such construction has become the settled rule of the Department.

In Baca Float No. 3, 12 L. D., page 680, the Secretary of the Interior says:

"Independently of this, the question as to whether the mineral character of the land was or was not known to claimants at date of location is immaterial. The act of June 21, 1860, authorized the heirs of Baca 'to select instead of the land claimed by them an equal quantity of vacant land *not mineral*,' and the burden of proof is upon the claimants under said grant to show that the lands selected or located are non-mineral lands, as no title to mineral lands can vest in them under said act, and the Department may at any time before the title passes from the Government require the claimants to show that the land is not mineral, *although the character of the land may not have been known to claimants at the date of selection or location*. If upon the hearing the proof should show that the land embraced in the location is mineral, the mineral land should be segregated from the non-mineral land by survey, and the grant claimants will be entitled to such part of said location as may be shown to be non-mineral."

On motion for review before Secretary Noble, the questions were gone into still more fully, and

in addition to holding at some length that the duties of a Surveyor General under this act were at all times subject to the supervision of the Secretary of the Interior and the Commissioner of the General Land Office, the legal questions arising upon the construction of the act of June 21, 1860, are also passed upon:

"The act of Congress authorized the selection of lands of a certain character, and when the claimants presented a selection thereunder, it certainly devolved upon them to affirmatively show the lands were of the character prescribed. By presenting a selection under said law, the claimants affirmed its non-mineral character, and they must stand ready to support such allegation. I do not find that the instructions given are inconsistent with the laws of evidence, and do not, therefore, find any necessity for modifying the decision complained of in that respect. It is said that the inference is inevitable from the language of both the Commissioner and the Secretary, and, therefore, tantamount to an instruction that if any mineral land shall be found within the boundaries of the selection made, then the whole selection must be rejected. This assertion is directly denied by the following, quoted from said departmental decision:

"'If upon the hearing the proof should show that the land embraced in the location is mineral, the mineral land should be segregated from the non-mineral land by survey, and the grant claimants will be entitled to such part of said location as may be shown to be non-mineral.'

"It is further argued in support of this motion that only those lands *known at the date of the selection to be mineral lands* should be segregated from the tract thus selected, and that the discovery of minerals, in any part of said lands, made after the date of selection, cannot affect the right and title of these claimants to said lands. The decision rendered in your office limited the inquiry to the two dates, that of selection in 1863, and of the amendment of such selection in 1866. While it is not said in so many words in the departmental decision that such instructions were in error, yet it was in effect so said. The following language was used:

"'The act of June 21, 1860, authorized the heirs of Baca 'to select instead of the land claimed by them an equal quantity of vacant land *not mineral*,' and the burden of proof is upon the claim-

ants under said grant to show that the lands so selected or located are non-mineral lands, as no title to mineral lands can vest in them under said act, and the Department may at any time before the title passes from the government require the claimant to show that the land is not mineral, although the character of the land may not have been known to claimants at the date of selection or location.'

"This can be construed only to mean that the inquiry should extent to the *present known character* of the land as well as to its character as known at the date of selection. This holding is in entire accord with the principle announced in the case of Central Pacific R. R. Co. vs. Valentine (11 L. D., 238). It was there said:

"'No date is fixed in the grant at which the mineral character of the lands must be known, in order to bring them within the exception. If, in fact, mineral, they are within the exception, according to the plain terms thereof; whether their mineral character is known at the time of definite location or approval of survey, or not.'

"It is contended that the language in the acts making the grant to the railroad company is so different from that employed in the act now under consideration, that the rule laid down in the Valentine case, admitted to be right there, cannot be applied here.

"The excepting clause in the act of July 1, 1862 (12 Stat., 439), is in these words: 'Provided that all mineral lands shall be excepted from the operation of this act.'

"The act of July 2, 1864 (13 Stat., 356), contains the following:

"'And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any Government reservation or mineral lands, or the improvements of any *bona fide* settler, or any lands returned or denominated as mineral lands,' etc.

"The act now under consideration provides that the beneficiaries thereunder may 'select, instead of the land claimed by them, an equal quantity of vacant land, not mineral'

"The evident intention in all these acts was to prevent the title to mineral lands from passing thereunder, and to express that intention the language in the act last mentioned is just as clear as that used in the others. The language used in the act under consideration should be given the same prohibitive force as is accorded the other acts mentioned."

These rulings conclusively show that the Department has both the willingness and the means

of making the examination and decision as to the character of the land, and in the case at bar the government is itself in court, declaring its position in the matter and its readiness to proceed with an examination of the lands. We insist that the question of the character of this land has never been passed upon, but was reserved under the express direction of the Commissioner of the General Land Office, both by his letter of February 12, 1864, authorizing the approval of the plat and survey, with the express direction to insert the special reservation stipulated by the statute, "but not to embrace mineral land," and the approval of the plat on March 15, 1864, by the Surveyor General in accordance with such instructions, and that such question so reserved is still open for examination and decision by the proper officers of the Department.

At the conclusion of the plaintiff's evidence upon the trial of this case, the defendant in error made the following motion, which was sustained by the Court, and as it summarizes our conclusions and the reasons for our claim, we venture to here restate it. The motion was for an instruction from the Court to the jury directing a verdict in favor of the defendant, upon the ground of the failure of sufficient proof to maintain the plaintiff's case. The grounds of the motion being:

"*First*—That there was no sufficient or proper selection of the land granted by the act of Congress of June 21, 1860, within the time limited by the act, three years from that date. That the so-called selection of Watts was void by reason of the uncertainty of the description, and that the designation of the initial corner as the base of the range was not a sufficient description to identify the

land, and that no further acts of identification or of selection of any kind or nature were had or done within the three years' limit of the act of Congress.

"*Second*—Because the act of Congress reserved all mineral land, and forbid the entry upon mineral land, and because there has never been, at any time, any form of conveyance, or any patent or deed, or any act of the Government, or of its officials, which had the effect of conveying the estate which the Government reserved by the act, to wit, mineral land of any kind. Because it is conceded by the pleadings in this case, and is shown by the proof, that the land in controversy is claimed and held by this defendant, and by his grantors, as mineral land; and that it is mineral land.

"*Third*—Because the proof of the plaintiff shows that no sufficient or proper survey of this land, or complete survey was made upon the ground until the lapse of three years after the so-called selection by Watts; that the Sheldon survey was incomplete, and remained incomplete, until the Darby survey in 1892.

"*Fourth*—We make a special objection, and as a ground of this motion, that the approval of the plat, made by Surveyor General Pierce on the 18th day of March, 1864, was expressly made subject to the provisions and conditions of the act of Congress, and because the evidence already introduced shows that a certificate of the Surveyor General that this was vacant land and not mineral, made upon December 5, 1863, was expressly, and in terms, rejected and disapproved by the Commissioner of the General Land Office in January, 1864, and no further or other certificate was ever made by the Surveyor General upon that subject.

"*Fifth*—Also, because the evidence in this case shows that the real claimant and locator of this ground, William Gilpin, located or attempted to locate this grant, in violation of the terms of the act, and in violation of its provisions and limitations, and with knowledge that he was seeking to take mineral land, and because that is shown by the record upon which the plaintiff must rely and with knowledge of which *they are* charged."

This motion the Court sustained, instructing the jury at some length, and discussing the questions involved, and stating the reasons for directing a verdict in favor of defendant. The charge of the Court is found in the printed record, at page 145.

This brief is intended as supplemental, only, and we ask in connection with it the consideration of the brief heretofore filed by us, based upon the certificate from the Circuit Court of Appeals of the United States, and also in connection with it, the consideration of the briefs filed in this case by the Government of the United States; and we respectfully ask an affirmance of the judgment of the Circuit Court of the United States for the District of Colorado.

All of which is respectfully submitted.

JOHN R. SMITH,
Attorney for Defendant in Error.

No. 1654

DEC. 15 189

JAMES H. MCKENNEY,

Filed Dec. 15, 1897.

In the Supreme Court of the United States.

QUINCY A. SHAW, PLAINTIFF IN error, *v.* MURRAY M. KELLOGG, DEFENDANT in error.	No. 154.

BRIEF AND ARGUMENT ON BEHALF OF THE UNITED STATES.

This case is pending in this court on a certificate from the United States circuit court of appeals for the eighth circuit.

The action was ejectment. Possession on behalf of the defendant was admitted, and the only question in the case was whether plaintiff had title.

Plaintiff relies upon section 6 of "An act to confirm certain private land claims in the Territory of New Mexico," approved June 21, 1860, and a selection and location thereunder, which section is as follows:

> SEC. 6. *And be it further enacted*, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as claimed by the town of Las Vegas, to select, instead of the land claimed by them, an equal quantity of vacant land.

not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: *Provided, however*, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

Under the provisions of this act the heirs of Luis Maria Baca selected certain lands which, at the time of the passage of the act, were a part of the Territory of New Mexico, now a part of the State of Colorado, known as Baca Float No. 4, which contains nearly 100,000 acres. The eastern line of the lands so selected includes a portion of the Sangre de Cristo range of mountains, on which valuable minerals have been discovered, these discoveries having been made as early as 1876.

The land in dispute is a mining claim located on the west slope of the range of Sangre de Cristo Mountains, which is alleged by plaintiff in his complaint, and shown by the proof, to be mineral land, and is included within the limits of Baca grant No. 4, as selected and surveyed.

The contention of the parties may be stated in a few words. On the part of the plaintiff it is that by the act of Congress above recited, the selection by the heirs of Baca, and the survey and other proceedings by the officers of the Government, the Baca heirs, or their representatives, had acquired the absolute title to this property prior to the discovery of mineral thereon, and that the action of the officers of the Government, with reference to such selection and survey, operated as an adjudi-

cation and estopped, as against the Government and those claiming under, it upon the question as to the mineral or non-mineral character of the land, and though the land is now admitted to be mineral, and hence excluded by the terms of the grant, yet by reason of the proceedings and adjudication above referred to the Government of the United States, and all claiming under it, are estopped to claim that the question as to the mineral character of the land is, or was in 1876—the time when mineral was discovered—open.

The defendant claims that there has been no adjudication as to the mineral or non-mineral character of the land; that no action has been taken by the officers of the Government which estop it to claim that the land is mineral, and hence not within the terms of the grant, and that the question as to the mineral character of the land being still open, and this land being admittedly mineral in character, is excluded from the grant; and hence the plaintiff showed no title.

This being the state of the record, the interest of the United States in this controversy is apparent, for if plaintiff's contention prevails the land in dispute, as well as other land of like character within the surveyed boundaries of the selection, passed by the grant, while if the defendant's contention be correct all such land remains a part of the public domain; and it, therefore, through its proper officers, has seen fit to ask permission of this court to file this brief in support of the contention of the defendant in error.

As the facts contained in the certificate have been quite fully stated in briefs of counsel for the original parties

to the cause, it is not necessary that they should be restated at length, and counsel will take the liberty to quote from them in the course of the argument, as the same may seem pertinent.

BRIEF OF ARGUMENT.

The questions involved in this case can, we think, be fully understood if discussed under the following general proposition, namely:

The right granted to the heirs of Baca by the act of June 21, 1860, was a mere right to select a certain quantity of land, in a certain number of parcels, in lieu of other land to which they made claim, and the exercise of this right by the heirs of Baca, or their grantees, vested in them a mere equitable title to the property selected until such selection had been accepted or approved by the proper officers of the Government, or until patent had issued. The effect of the survey by a private surveyor and approval of the plat and field notes of such survey by the surveyor-general was merely to designate upon the face of the earth the particular tract selected and to fix its boundaries, and the right of the heirs of Luis María Baca under this grant is to this day a mere equitable title, and will remain such until, by some act of a duly authorized officer, the legal title of the Government to the property shall pass.

This case having been discussed by counsel for plaintiff in error as though it were admitted that this grant is an ordinary one *in præsenti*, it is important at the outset to ascertain the character of the grant itself; and in order to do this, the granting act, as well as all the surrounding circumstances, must be taken into consideration.

It appears from the recitals of the grant that Luis Maria Baca made claim to a certain land grant in the Territory of New Mexico, which was in conflict with the Pueblo grant claimed by the town of Las Vegas; that the town of Las Vegas secured confirmation of the Pueblo grant, and Congress having thus lost the power to confirm to the heirs of Baca their claim in place, and the Baca heirs having proven, to the satisfaction of Congress, that their claim was a just and equitable one, they were given, by this act, the right to select an equal quantity of vacant land, *not mineral*, in the Territory of New Mexico, instead of the land so claimed by them.

Counsel have referred to the title of this act as showing an intention on the part of Congress to *confirm* the title to the grantees, and thus add force to their argument that the grant should be construed as one *in præsenti*, and in ascertaining what weight should be given to this argument, it is important to note the provisions of other sections of the act.

Section 1 is an act of confirmation of thirteen grants, the granting words being, "That private land claims in the Territory of New Mexico, as recommended for confirmation by the surveyor-general of that Territory, * * * *be, and they are hereby, confirmed.*"

Section 2 provides for the survey of one of these grants. Section 3 confirms nineteen grants, the granting words being, "That the private land claims in the Territory of New Mexico, as recommended for confirmation by said surveyor-general, * * * numbered from twenty to thirty-eight, both inclusive, *be, and the same are hereby, confirmed.*"

Section 4 limits the effect of the grant to a quitclaim. Section 5 authorizes suit to be brought against the Government on account of a certain grant therein named, and section 6 is quoted above.

Thus it will be seen the title of the act apparently refers to the main subject of the act, namely, the confirmation of thirty-two private land claims; hence it can not be said to aid the court in arriving at a correct conclusion as to the intention of Congress in enacting the sixth section, especially where its intention is clearly and plainly expressed in the section itself.

Many cases are cited construing grants *in præsenti*, and as the rules of decision laid down in these cases are invoked by counsel for plaintiff in error in this case, it may not be amiss to examine the granting words construed therein, with a view of ascertaining whether the words used by Congress in this case should receive the same construction.

The first case cited is *Rutherford against Greene's heirs*. (2 Wheaton, 197.) The grant under discussion in that case was made by the State of North Carolina in 1782, and provided "That twenty-five thousand acres of land shall be allotted for and given to Major-General Nathaniel Greene."

In pursuance of the direction of the act, commissioners allotted twenty-five thousand acres of land to General Greene, and caused the tract to be surveyed.

On the 12th of April, 1783, the general assembly of North Carolina passed "An act for opening the land office," the provisions of which, it was contended, revoked

or recalled the gift made by the act of 1782 to General Greene. In 1784 an act was passed authorizing the issuance of a grant or patent to General Greene, and pursuant to this act the grant or patent was issued, and the question at issue was, (1) whether the act of 1783 operated as a revocation of the grant to General Greene, and (2) whether the act of 1782 did not operate to vest such a title in General Greene as would support the grant paper or patent issued under the act of 1784; and the court held that the act of 1783, when properly construed, did not operate to revoke the gift of 1782, that the rights vested in General Greene by the act of 1782 were not impaired by the act of 1783, and that such rights became perfect by the grant which issued under the act of 1784.

This is all there was in that case. There was no condition or reservation in the grant, and no question analogous to the question in this case arose or was decided in that case.

The next case cited is *Grignon's Lessee against Astor* (2 How., p. 310). The grant under discussion in that case was approved February 1, 1823 (3 Stat. L., p. 724), and the granting clause is as follows:

"Such persons *are hereby confirmed in their claims*, agreeably to any surveys heretofore made," etc. These words, so well understood at this date, are sufficient to show an intention to make a present grant, and are entirely different from the words used in the act of Congress now under discussion.

The case of *Strother against Lucas* (12 Peters, p. 454) construed the provisions of an act of Congress approved

June 13, 1812, and the words of the granting clause, construed by the court in the excerpt of the opinion quoted in that case and in the brief of counsel for plaintiff, are as follows:

> That the rights, titles, and claims to town or village lots, etc., shall *be, and the same are hereby, confirmed* in the inhabitants of the respective towns and villages aforesaid.

The statute before the Supreme Court in the case of *Chouteau against Eckrd* (2 How., 372) is to be found at the Fifth Statute at Large, page 126, and the granting words are as follows:

> That the decisions in favor of land claimants made by the recorder of land titles in the State of Missouri, and the two commissioners associated with him * * * *be, and the same are hereby, confirmed.*

In *Ryan and others against Carter and others* (93 U. S., p. 78), the court had under consideration the act of June 13, 1812 (2 Stats., 748), and the words construed and held to operate as a grant *in praesenti* are as follows:

> That the rights, titles, and claims to town or village lots * * * adjoining and belonging to the several towns or villages, * * * shall *be, and the same are hereby, confirmed* in the inhabitants of the respective towns or villages aforesaid.

The granting words in all these acts, as well as in the subsequent acts granting lands to railroads, which have been repeatedly construed by this court to operate as grants *in praesenti*, have all contained the words "be and are hereby granted," or the words "be and are

hereby confirmed," or words having equivalent meaning and evidencing the same intention.

In the Union Pacific grant of July 1, 1862 (12 Stat. L., 489), the granting words are "That there *be and is hereby granted* to said company," etc.

In the Northern Pacific Case (see act of July 2, 1864, 13 Stat. L., p. 365) the granting words are "That there *be and hereby is granted*," and in the Atlantic and Pacific Case (see act of July 27, 1866, 14 Stat. L., 293) the granting words are identical with those above quoted.

As is said by Mr. Justice Davis, in the case of *Railroad Company against The United States* (92 U. S., p. 733; L. C., p. 741):

> "*There be and is hereby granted*" are words of absolute donation and import a grant *in præsenti*. This court has held that they can have no other meaning, and the land department on this interpretation of them has uniformly administered every previous, similar grant.

A comparison of the several acts of Congress, which have been construed by this court as grants *in præsenti*, with the act of 1860, giving permission to the heirs of Baca to select a quantity of vacant land, not mineral, in the Territory of New Mexico, will show a broad line of demarcation, and will, we think, show conclusively that it was not the intention of Congress, by the act of 1860, to make a present grant.

We have thus far endeavored to show what this grant is not, and we will now endeavor, if possible, to show by a comparison with other acts of Congress, using similar language, what it is.

It will be noted that the substantial language of the act is as follows:

> That it shall be lawful for the heirs of Luis Maria Baca to select, instead of land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, etc.

In the Northern Pacific grant occurs the following language:

> Whenever * * * any of said sections or parts of sections shall have been granted, sold, reserved, * * * or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior.

In the Atlantic and Pacific grant (14 Stat. L., p. 295) occurs exactly the same language.

And this clause of these statutes is, as is the act of 1860, purely and simply an indemnity grant. These indemnity clauses have never been held to operate as grants *in præsenti*, and have never been considered as effectually passing the title out of the Government until the lands have been selected and such selection formally approved, or the land patented, by the officers of the United States. That there is a broad distinction between "granted lands" under grants which take effect *in præsenti* and "lieu" or indemnity lands, as to which title passes only when the same have been selected and such selection approved, is well settled by this court in the case of *Wisconsin R. R.* v. *Price County* (133 U. S., 496).

By the act of Congress approved July 17, 1854 (10 Stat. L., p. 304), the President was authorized to ex-

change, with certain half-breed Indians for a tract of land to which they were entitled, other lands in lieu thereof, and upon the relinquishment by them to the United States of their interests in their lands the Commissioner of the General Land Office was authorized to issue to such half-breed Indians certificates or scrip for the same amount of land to which each individual would be entitled in case a division of their lands was made. And the act contained this provision: "Which said certificate or scrip may be located upon any of the lands within said reservation not now occupied by actual and *bona fide* settlers," etc.

This act created indemnity grants or floats similar in every particular, except as to the reservation of mineral, to that created by the sixth section of the act of 1860, and the interest acquired by the half-breed Indians named in the act in the lands upon which these certificates were located is identical, as a matter of law, with the interest of the heirs of Luis Maria Baca in land selected by them under the act of 1860, the only difference being that in one case the right to select was evidenced by certificates issued by the Commissioner of the General Land Office while in the other the right to select was given by the act of Congress itself.

In the case of *Carter against Ruddy* (166 U. S., p. 493) the legal status of the holders of certificates under the above-cited act of 1854, after the same had been located and before patent was issued, was before this court, and that case seems to be decisive of this in respect of this question.

The contention in that case was, as it is in this, that the location of the scrip operated to transfer the legal title to the locator; that no patent was necessary, and that the legal title was in him, by virtue of the act of Congress, the certificate, and the location; and with reference to this contention, Mr. Justice Brewer, speaking for the court, says:

> "While it is true that the act of 1854 does not in terms provide for the issue of a patent, and simply authorizes the location of the scrip upon any public lands, yet the general rule is that a patent is necessary for the transfer of the legal title,

citing with approval and quoting from the case of *Bagnell* v. *Broderick* (13 Pet., 436, L. C. 450), as follows:

> 'Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the whole legislation of the Federal Government in reference to the public lands declares the patent the superior and conclusive evidence of legal title. Until its issuance the fee is in the Government; by patent it passes to the grantee, and he is entitled to recover the possession in ejectment—'

quoting also with approval the case of *Wilcox* v. *Jackson* (13 Pet., 498), and then disposes of this question thus:

> 'There is nothing to exempt this case from the ordinary rule that a patent is necessary to convey the legal title; that the certificate of location created at best but an equitable title.'"

In the case of *Wilcox* v. *Jackson* (13 Pet., 498; L. C., 516) this court says:

> "We think it unnecessary to go into a detailed examination of the various acts of Congress for the

> purpose of showing what we consider to be true in regard to the public lands—that, with the exception of a few cases, nothing but a patent passes a perfect and consummate title. One class of cases to be excepted is where an act of Congress grants lands, as is sometimes done, in words of present grant; but we need not go into these exceptions. The general rule is what we have stated."

It being the general rule that nothing but a patent will operate to divest the United States of its legal title to the public domain, there is nothing in this case which makes it an exception to that general rule, and the labored and ingenious effort of counsel for plaintiff in error to put this case on all fours with grants containing words evidencing an intention on the part of Congress to make a present grant has been heretofore sufficiently discussed in this brief.

But it may be argued that the officers of the land department, by their rulings, refused to issue a patent to this grant, on the ground that "the question as to the mineral or nonmineral character of this land has [had] been passed upon by competent authority."

This contention is based upon a letter of Commissioner Williamson, dated March 21, 1879 (Rec., pp. 12, 13, and 14), and as this letter is quoted at length twice in plaintiff's brief, and it, together with subsequent correspondence based upon it, forms the basis for a large portion of plaintiff's brief and the only basis of his title to mineral land, it is deserving of more than a passing notice.

This letter is sought to be used as if deciding a question then pending before him, viz, an application for a patent to this land.

If the letter is to be construed in this light, then, in so far as it passes upon that question, the decision, being by the proper officer of the Government, is entitled to great, if not conclusive, weight.

Let us view it in this light, viz, as an application for a patent by the representatives of the grant claimants, and we find that this application was *denied*. That is the entire *record*. That is what is conclusive upon the Government—or rather in favor of the Government—and this adjudication of the Commissioner *against* the issuance of a patent is sought to be used here to the same effect as if he had decided that question the other way.

It is true that in refusing to issue the patent the Commissioner gives *reasons*, which form, as before stated, the principal basis for plaintiff's brief.

Now, the weight to which the Commissioner's *decision* is entitled is fixed by law. The weight to which his *reasons* are entitled is greater or less, as such reasons may or may not accord with the law and the facts in the case.

If the reasons are to be read in the light of the facts as they then existed, it will be borne in mind that at that time the property in dispute was "known to be mineral" in character and had been so known for three years or more. If those reasons are to be read as constructions of the legal effect of the acts of his predecessors, then I assume that to be a question which it is the province of

this court to pass upon, after full hearing, and when all parties in interest have had an opportunity to present and support their respective claims.

In short, if this letter is quoted as an adjudication of a matter then pending before the Commissioner, we have simply to say that it was decided without notice and without evidence, and was in any event decided in favor of the Government; and, if it is quoted as a legal opinion as to the effect of the acts of his predecessors, it is mere hearsay and should be given such weight, and such weight only, as its own reasoning entitles it to. As its reasoning is contrary to the settled practice of the Department and contrary to repeated decisions of this court, it seems to us that its length and the space which it occupies in the brief of counsel, are its principal recommendations to notice. The letters of Commissioner McFarland and Acting Commissioner Stone are of the same character, and what has been said above applies equally to them.

However this may be, this court is not bound by the decision of any of the officers of the Land Department upon a question of law, as was decided in the case of *Irvin against Marshall* (20 How., p. 567), where Mr. Justice Daniels, speaking for the court, said:

> "It has been argued that it is the practice of the officers of the Land Office to receive the certificate of purchase as presenting upon its face the only evidence of title, and that those officers will recognize no other evidence of title but this certificate. Of the practice or the opinion of the officers of the Land Department, no evidence is exhibited upon this record. But, supposing these to be in accordance with the above suggestion, they could by no

> means control the action or the opinion of this court in expounding the law with reference to the rights of parties litigant before them; and this they must do, in accordance with their own convictions, uninfluenced by the opinions of any and every other department of the Government."

Under the act of Congress the power to make selection of the land to satisfy this grant is vested in the heirs of Luis Maria Baca. They were the sole judges of what lands should be selected and surveyed. The duty of the surveyor-general was to make survey and location "*of the lands so selected by the said heirs of Baca.*" That the mere selection of the lands by the heirs of Baca could not operate as an adjudication or an estoppel upon the Government seems to be axiomatic, if it be borne in mind that they were the sole judges of the land to be selected. Can any man be a judge and make an adjudication in his own favor and against another? Can any man create an estoppel against another by any transaction in which he himself is the only participant? Could "the said heirs of Baca," by their own act, by ignoring the very provisions and limitations which Congress had incorporated into the act as the protection of the Government in the transaction, gain an advantage to themselves and against the Government?

Again, the authority vested in the surveyor-general to survey this land certainly gave him no power to pass upon the mineral or non-mineral character of the land. The survey relates merely to the ascertaining and fixing the boundaries and preserving a record of the same in the form of plats and field notes, and has nothing whatever to do with any adjudication as to the character of

the land, nor can an officer who is merely authorized to make a survey estop the Government except as to matters necessarily included in a survey.

But I do not understand it to be contended by counsel for plaintiff that the mere exercise of the power of selection by the Baca heirs operated passed the title to this land from the Government, or concluded the Government upon the question as to the mineral or non-mineral character of the land; nor do I understand counsel to contend that the mere authority to survey vested in the surveyor-general power to make any finding or adjudication which should be binding upon the Government as to the mineral or non-mineral character of the land; but counsel seem to have found some comfort in the words "to be located" and "make location," as found in the act, and seem to have argued themselves into the belief that these words included the power to pass judgment as to the character of the land and to estop the Government to say that this land is mineral.

The word "locate" has a well-understood meaning, and is applied differently in accordance with the connection in which it is used. Thus the words "to be located," when used with reference to the Baca heirs, means the "designation by *approximate boundaries* of a specific tract;" whereas, by the words "make location," when used in connection with the word "survey" in fixing the duty of the surveyor-general, is evidently meant that these boundaries shall be definitely and certainly fixed by the survey. So that by the words "to make survey and location of the lands so selected" is

meant nothing more than to make survey and thereby locate the lands selected, etc.

It is well understood that the surveyor-general is not a judicial officer; that save in exceptional cases he has no judicial functions, and in those exceptional cases such powers have been expressly vested in him by law, and his power to exercise them is prescribed and limited by the act investing him with the power. And it has never been held that the mere power to make survey and location of a piece of land authorized any officer of the Government to make a judicial finding or to make a final ascertainment as to the character of the land which would be an estoppel as against the Government.

As is said by Secretary Noble in the case of *Railroad Company against Valentine* (11 L. D., p. 238; L. C. 244):

> The Secretary of the Interior is clothed with the authority of determining in the first instance which lands passed by the grant, and which did not pass, and this he does by approving lists for certification or patent.

The same rule was announced by Secretary Teller in the case of *Cole against Markley* (2 L. D., 847; L. C. 849), quoted with approval by this court in the case of *Barden* v. *The Northern Pacific Railroad Company* (154 U. S., p. 288; L. C. 320). In the latter case this court says:

> Some weight is sought to be given by counsel of the plaintiff to the allegation that the lands in controversy are included in the section which was surveyed in 1868, and a plat thereof filed by the surveyor in the local land office in September of

that year, from which it is asserted that the character of the land was ascertained and determined, and reported to be agricultural, and not mineral. But the conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the surveyor-general. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted, or to make any binding report thereon.

* * * * *

The determination of the character of the land granted by Congress, in any case, whether agricultural, or mineral, or swamp, or timber land, is placed in the officers of the Land Department, whose action is subject to the revision of the Commissioner of the General Land Office, and on appeal from him, by the Secretary of the Interior. *Under their direction and supervision, the actual character of the land may be determined and fully established.*

It thus appears that no authority was vested in the surveyor-general under the general law to make the adjudication or to create the estoppel set up by the plaintiff in this case; nor did he have any such power or authority by virtue of the granting act of 1860.

It is, perhaps, proper to next inquire whether such authority was delegated to him by the Commissioner of the General Land Office.

On December 8, 1860, the surveyor-general certified to the heirs of Baca the number of acres included in the Las Vegas land grant, and on February 9, 1863, he forwarded to the Commissioner of the General Land Office a statement of the selection of what is now known as Baca grant No. 4 and the application for survey and location

of the tract by the attorney of the applicants (copy of which application seems to have been sent to the surveyor-general of Colorado and Utah—Colorado Territory having in the meantime been created), and the surveyor-general of Colorado and Utah gave to the Commissioner of the General Land Office the following information:

> "I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca floats, and should locate it as this is located, for the reason that, in his opinion, it would cover rich minerals in the mountains."

Action was taken upon this application by the Acting Commissioner March 13, 1863, which action appears on page 5 of the printed record, and the following is quoted therefrom:

> "It is necessary, before the application can be approved *by this office*, that it be accompanied by the certificate of the surveyor-general and the register and receiver that the land is vacant and not mineral. * * * Especially should the character of the location as to minerals be carefully ascertained, after the important statement of ex-Governor Gilpin which you communicated in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, you will transmit to this office your official certificate setting forth those facts."

Upon application of ex-Governor Gilpin, the surveyor-general reports, on October 13, 1863, that he has made

a contract with Deputy Surveyor A. Z. Sheldon for the survey of the grant, stating, however, that it was without authority and contrary to the instructions of the Department, but upon the urgent application of ex-Governor Gilpin he had made the contract, subject to the approval of the Commissioner. This contract was disapproved by the Commissioner on November 2, the Commissioner again calling the attention of the surveyor-general to the suspicious circumstances with reference to the location of this float by ex-Governor Gilpin, and stating that the survey must be postponed until the vicinity is reached by the regular progress of the public surveys.

On December 12—the former surveyor-general having in some unaccountable way lost his position—Surveyor-General Pierce makes a report, which indicates that, notwithstanding the disapproval of the contract with Sheldon and in defiance of the instructions of the Commissioner to wait until the public surveys should reach the vicinity, Sheldon has proceeded under his disapproved contract to make the survey of the lands selected by ex-Governor Gilpin.

With this report is transmitted a certificate of the new surveyor-general, that from good and sufficient evidence he was satisfied that the land was not mineral, and vacant.

On January 16, 1864, the Commissioner calls attention to his former instructions, states that the evidence furnished as to the nonmineral character of the land is not sufficient, and suspends the approval of the selection.

On February 12 the Commissioner again considers the report of the surveyor-general respecting Sheldon's survey, and calls attention to the fact that the survey was paid for, not by the Government out of the moneys deposited by the claimant as required by law, but was paid for directly by ex-Governor Gilpin to the surveyor, and that all the testimony on file in the surveyor-general's office is an abstract of the field notes made by the surveyor-general by permission of Mr. Gilpin.

The Commissioner then proceeds to say that this proceeding is irregular, and although the statute requires the private claimant to pay for the survey, yet the work must be done under the obligations and responsibilities of the surveyor-general and his subordinates. To save the expense of a resurvey, however, he authorized the filing of the *original field notes* in the surveyor-general's office, and upon the same being regularly tested and ascertained to be regular and correct, *the surveyor-general was authorized "to approve the said survey, but in your certificate of approval you will add the special reservation stipulated by the statute, 'but not to embrace mineral land, nor to interfere with any other vested rights, if such exist.'"*

This letter of February 12, 1864, found on pages 9 and 10 of the printed record, is the basis and foundation of the only authority for the action taken by the surveyor-general. Except for the authority contained in this letter, no survey, even, has ever been made of this land. The land was selected by Gilpin, was surveyed by his employee, and no officer of the United States, so far as

is disclosed by this record, has ever seen the land, made a survey of it, or located it, and not only the action of the surveyor-general with reference to the character of the land, but the survey itself, depends for its validity upon this letter of the Commissioner of the General Land Office.

In accordance with the authority contained in this letter, the field notes and plat of what was up to that time the private survey of A. Z. Sheldon, was approved, and in accordance with the requirement of this letter the approval was "subject to the conditions and provisions of section 6, of the act of Congress approved June 21, 1860."

It is contended by counsel that the Commissioner of the General Land Office had no authority to impose conditions upon the selection not in the act. This is undoubtedly true, and the surveyor-general did not seek to do so. His authority was limited by the letter of the Commissioner authorizing him to approve a private survey. The Commissioner knew, and he knew, that Sheldon was a mere employee of Gilpin, that any report he might make as to the character of the land would not be made "under the usual obligations and responsibilities of deputies and surveyor-general," and though the Commissioner might have been willing to accept and approve the report of a regular deputy surveyor acting under their usual "obligations and responsibilities," and upon such report to approve the survey and location unconditionally, he apparently was unwilling to take that responsibility upon the report of a private employee of Gilpin, and, possibly,

for that reason required the insertion of the words in the approval that the same was "subject to the conditions and provisions of section 6 of the act of Congress approved June 21, 1860," but whatever may have been in the mind of the Commissioner, those were his instructions—whatever of authority the surveyor-general had as to that private survey he had under those instructions. The plaintiff must take those instructions as a whole, or must repudiate them altogether. He can not accept that portion which is favorable to him and reject that portion which he deems will prejudice him. If he repudiates those instructions then he has no official survey at all. If he accepts them and the certificate made under them, then the reservation of mineral land remains in these proceedings from the granting act to the last official act in connection with the land—the certificate of approval by the surveyor-general.

The condition of this title, as shown by the act and proceedings with reference to the mineral character of this land, is, as has already appeared, as follows:

The granting act reserved the mineral; the authority given by the Commissioner of the General Land Office to the surveyor-general directed him to include the mineral reservation in his certificate. The reservation was included in his certificate, and the plaintiff in error occupies the unenviable position of asking for a judgment based upon the existence of a fact which he alleges in his own pleadings is not a fact. He claims title to a tract of land as being nonmineral which, by the allegations of his complaint and his own proof in the

circuit court, is shown to be in fact mineral land. He claims title to a tract of mineral land as having been granted by an act of Congress which expressly excluded mineral land from its operation. He claims that a tract of land, which he admits is in fact mineral land, is rendered non-mineral because a surveyor-general of Colorado has made a certificate, based on general rumor, that in his opinion it was non-mineral. He claims that this certificate of the surveyor-general is greater than the order of the Commissioner of the General Land Office, by which it was expressly rejected as being based on insufficient evidence. He claims that although Congress did not intend to convey mineral land, and did not convey it, and although the Commissioner of the General Land Office required that it should be expressly reserved in the certificate of approval of the survey, and although it was expressly reserved in the certificate, that he owns it nevertheless, because he succeeded in having it included within the surveyed boundary of the lands he selected.

It is conceded by counsel for plaintiff in error that the approval of the Commissioner of the General Land Office, either express or implied, is essential to make the selection under this act complete. (See p. 52 of brief.) This concession makes unnecessary to sustain by reasoning or authority the proposition that the general control given to the Commissioner of the General Land Office, under the supervision and direction of the Secretary of the Interior, over the disposition of the public domain of the United States, makes his approval essential to any act,

the result of which is to transfer title of the public domain from the United States to any private individual. But it is argued that as the Commissioner of the General Land Office acknowledged the receipt of the survey, with the approval of the surveyor-general indorsed thereon, on May 4, 1864, and took no formal action by way of disapproval, that his approval of the action of the surveyor-general will be implied.

With reference to this argument it must be remembered that the approval of the surveyor-general in itself included the reservation of mineral land, and if the Commissioner of the General Land Office will be held to have approved the action of the surveyor-general, then such approval must go to the entire certificate. In other words, plaintiff can not contend that inaction on the part of the Commissioner of the General Land Office operated as a passive approval of the certificate in so far as said certificate validated the unauthorized survey, and rejected that portion of the certificate which recited that it was subject to the conditions and provisions of section 6 of the act of Congress approved June 21, 1860; that this certificate approval must stand as a whole or it must fall altogether. With it the mineral land is reserved, even though within the land surveyed; without it plaintiff has no pretense of any authorized survey or location by the officers of the Government.

That the Secretary of the Interior did not deem the question of the mineral or nonmineral character of the land as determined until he, or some officer of the Government thereto duly authorized, had judicially passed upon the matter, or until a patent had issued, is shown by his

construction of this identical act of Congress, in case of *Baca float, No. 3* (12 L. D., 676), and the same case on review (13 L. D., 624), and the latter decision is so apt, and the position stated in such forcible language, that I take the liberty of quoting therefrom as part of the argument in this case:

> The evident intention in all these acts was to prevent the title to mineral lands from passing thereunder, and to express that intention the language in the act mentioned is just as clear as that used in the others. The language used in the act under consideration should be given the same prohibitive force as is accorded the other acts above mentioned. If this be true, and I do not think it can be successfully controverted, it follows that the reasoning in the Valentine Case applies with equal force in the case now under consideration, and that the rule there laid down should be followed here. That rule was followed in the decision complained of, and hence there is no reason to modify it as to that point.

The relation existing between the officers of the Department and the surveyor-general is well understood, and is well stated in the case of *Winscott against The Northern Pacific Railroad Company* (17 L. D., 274), and in Northern Pacific Railroad Company against Marshall (17 L. D., 545), in which latter case the Secretary quotes with approval from the former as follows:

> "The report of the surveyor must necessarily constitute but a small element of consideration when the question is as to the true character of the land."

And if this be the case where the survey is made by a regularly authorized deputy surveyor, under the "obligations and responsibilities" of that position, and under

the direct supervision of the surveyor-general, of how much less weight is the report of a surveyor employed and paid by a grant claimant under the circumstances detailed in this case.

The question as to the relation of the Secretary of the Interior and Commissioner of the General Land Office to public lands is discussed in the case of *Stoneroad against Stoneroad* (158 U. S., p. 240), where grant No. 1, confirmed by the first section of the act of June 21, 1860, was under discussion, and in that case the court says:

> "At the time of the passage of this act (the act of June 21, 1860), and for a long time prior thereto, the general laws of the United States confided to certain administrative officers the duty of surveying not only the public lands, but also private land claims. The practice of the United States in dealing with the public domain and all governmental grants of lands is to survey *and issue a patent*."

And this decision then proceeds to hold that in all important matters, up to the date of the issuance of a patent all questions relating to disposition of the public domain and surveying of private-land claims and issuance of patent thereon, the Secretary of the Interior is the supervising agent of the Government to do justice to all claimants and preserve the rights of the people of the United States.

As has been seen, this act vests that responsibility in no other person, and hence no other person but the Secretary of the Interior, or some officer of his Department acting under his authority, could bind the Government, by an adjudication or by way of estoppel, as to the mineral or nonmineral character of this land.

As heretofore stated, the admission of counsel that the approval of the survey by the Commissioner of the General Land Office, either express or implied, is necessary to make it valid, makes it unnecessary to support that position by citation of authorities or by reasoning.

In view of this admission, and the well-known law on the subject, section 6 of the act of 1860 will be construed as though it read, "subject to the approval of the Commissioner of the General Land Office," such approval, of course, to be confined to passing upon the character of the land as to being vacant and non-mineral. And it has been repeatedly held that where such a provision is included in a statute formal action of the Land Department is necessary in order to validate a location or selection, such action being by way of formal official approval of certificate of selection or location or by the issuance of a patent.

In the case of *Wisconsin Railroad against Price County* (133 U. S., 496), a railroad grant to the State of Wisconsin for the purpose of aiding in the construction of a railroad was under consideration by the court, and the question at issue was when the title passed out of the United States and into the grantee, so as to make the same taxable under the law which exempts property of the United States from taxation, and the court held that as to lands within the primary limits of the grant, so soon as

> "The route of the road was definitely fixed, the sections granted became susceptible of identification and the title attached to them and took effect as of

> the date of the grant. * * * But as to the remainder of the lands which fell within the indemnity limits the case is different. For such lands no title could pass to the company, not only until the selections were made by the agents of the State appointed by the governor, but until such selections were approved by the Secretary of the Interior. But that officer never approved them. Nor can such approval be inferred from his not formally rejecting them."

It may not be amiss to review in a few words some of the authorities cited by counsel for plaintiff in error.

In the case of *Davis, administrator, against Weibold* (139 U. S., 507), the contest was between a *patentee* under the town-site law and one claiming under a *subsequent patent* under the mining laws of the United States, and the question at issue was thus stated by Mr. Justice Field, who delivered the opinion:

> "When the entry of the town site was had, *and the patent issued*, and the sale made to the defendant of the lots held by him, it was not known—at least it does not appear that it was known—that there were any valuable mineral lands within the town site, and the important question is whether in the absence of this knowledge the defendant can be deprived under the laws of the United States of the premises purchased and occupied by him because of a subsequent discovery of minerals in them and the issue of a patent to the discoverer."

This extract from the opinion shows how foreign discussion of that case is to any question involved in this.

In the case of *Deffeback* v. *Hawke* (115 U. S., 392), the same judge, in discussing a similar question, uses

language showing that the date of the patent is the date at which the right to mineral lands not known to be mineral accrues to the settler. In this case the mining claim was located and the land bought before the town site was located or applied for, and in discussing the question the court uses the following language:

> "It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and *patented by the Government* under the preemption laws, may be found, years *after the patent has been issued*, to contain valuable minerals. Indeed this has often happened. We therefore use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made *and the patent issued*."

In the case of *Ryan against Carter* the statute, instead of being "quite similar" to the one now under discussion, uses this language:

> That the rights, titles, and claims *shall be, and the same are hereby, confirmed to* the inhabitants of the respective towns or villages, etc.

In the case of *Menard against Massey* (8 How., 293), the only question was as to the boundaries of the grant, and the only matter as to which the United States was held to be concluded was that properly within the powers of the surveyor, namely, the fixing of the boundary lines. This was purely a ministerial act and involved no decision or adjudication as to the character of the land, nor did it involve the exercise of any judicial or quasi judicial function.

This is also true of the cases of Cousin against Bone, executor (19 How., 292); *Frazier against O'Connor* (115 U. S., 102); *McCreery against Haskell* (119 U. S., 327), *and Tubbs against Wilhoit* (138 U. S., 134).

In the case of *Langdeau against Hanes* (21 Wall., 521), the granting act was in the usual form of a grant *in præsenti*, using the words "be and the same are hereby confirmed."

In the case of *Ryan against Forsythe* (19 How., 334), the General Land Office had recognized and approved the survey by the issuance of a patent.

The citation of counsel from the case of *Stark against Starr* (6 Wall., 413) would have been of more assistance to the court had he extended it a few lines. Counsel quotes as follows:

> "The right became perfected when the certificate of the surveyor-general and accompanying proofs were received by the Commissioner of the General Land Office *and he found no valid objection to them.*"

If counsel had taken time to read a little further, it would have been found that the court proceeded to make this statement plain by the use of this language:

> "That is to say, if the donation act of 1850 was applicable to the lands, his right to a patent became perfect when the certificate of the surveyor and accompanying proof showed, in the judgment of the Commissioner, a compliance with its requirements. *That they were satisfactory to his judgment in this respect follows from the subsequent issuance by him of the patent.*"

Counsel seem to have found some difficulty in understanding what was meant by Commissioner Edmunds in

his letter of instructions of February 12, 1864, by the use of the expression "but in your certificate of approval you will add the special reservation stipulated by the statute, 'but not to embrace mineral land nor to interfere with any *other vested rights*, if such exist,'" and counsel in their difficulty inquire, "Why did he say 'other' vested rights?" and then proceed to argue that the very word implies that the alternative expression involved some "vested rights."

We are unwilling that counsel should be uncertain as to the meaning of any expression in this important letter of instructions, on which their entire title depends, and take pleasure in giving, in our poor way, what we deem to be the meaning of that expression.

By the terms of the act two classes of lands are expressly excepted from its operation: First, land that is not vacant, and, second, mineral land.

It was the intention of the Commissioner that the certificate should include these identical reservations, hence the requirement that the certificate should recite that the approval was not to include mineral land, nor was it to include lands not vacant, and the vested right of the Government in mineral lands was one class of vested rights which that certificate reserved, the other class of vested rights being the rights of settlers or occupants of lands not vacant.

It seems impossible to distinguish this case in such a manner as to prevent the application of the principle announced in the case of *Borden* v. *N. P. R. R.* (154

U. S., 288), cited and quoted from at length in briefs of both the original parties to this case.

If it be conceded that the act of Congress, the selection, and the survey vested in the heirs of Baca only an equitable title, as was held in the case of *Cutter* v. *Ruddy* (*supra*), then this case is much stronger than the Barden Case, and calls much more plainly for the application of the principle invoked there, while if it shall be held that the act operated as a grant *in præsenti*, this case is still clearly within the rule there decided.

In this action of ejectment it hardly seems necessary to reply to the appeal to the equity side of this court with which the brief for plaintiff in error concludes. It is well understood that this is strictly a legal action; that when the Baca heirs accepted the grant of 1860, with the reservations, they took the same *cum onere*, and that they must bear the burden of the reservation unless that incumbrance has been removed.

It may not be out of place, however, to call attention to the fact that this was an exchange of property, acre for acre; that the right of Baca to his original grant was subject to this same burden or reservation, and that under the terms of his original grant there were no means by which the incumbrance or reservation could be removed, and that had he taken his original grant *in place*, and had there been no change of sovereignty, all minerals were *perpetually* reserved to the Government. (Rockwell's Spanish and Mexican Law, p. 49, secs. 1, 2, and 3; ibid., p. 112, 113, and 114.)

This, of course, was a matter for consideration of Congress, and but brings us back to the true rule in the case, that plaintiff must recover upon the act of that body and steps taken under it.

Those may be recapitulated thus:

June 21, 1860. Act giving right of selection from vacant lands not mineral (R., 2).

February 5, 1863. Application to select and locate filed (R., 3 and 4).

February 24, 1863. Department notified of intention of ex-Governor Gilpin to locate mineral land (R., 4).

March 13, 1863. Commissioner requests the report as to character of land (R., 5).

October 13, 1863. Surveyor-general reports conditional contract for survey with Sheldon (R., 5).

November 2, 1863. Sheldon contract disapproved (R., 6).

December 12, 1863. Report of surveyor-general that land is nonmineral and transmitting Sheldon's survey (R., 7).

January 16, 1864. Report of surveyor-general as to character of land disapproved (R., 8).

February 12, 1864. Survey of Sheldon disapproved but permission given to approve same if found correct including in certificate, reservation in granting act (R., 9).

March 15, 1864. Field notes approved by surveyor-general (R., 11).

March 18, 1864. Map of survey approved "subject to conditions and provisions of the act" (R., 11).

May 4, 1864. Field notes, etc., filed with Commissioner.

A fair résumé of these proceedings, in so far as they have not been formally disapproved, is as follows:

Congress in 1860 gave to the heirs of Baca a right to select certain vacant lands not mineral.

In 1863 these heirs exercised their right of selection.

In same year the claimants caused a private survey to be made of the lands selected.

In 1864 the surveyor-general was authorized to approve such private survey upon condition that he should include in his certificate the reservations included in the act. In the same year, in compliance with this authority, he does approve this survey, and in his certificate recites that the approval "is subject to the conditions and provisions of section 6 of the act of Congress approved June 21, 1860."

In other words, Congress did not intend to grant mineral land and did not grant it; the Commissioner did not intend that any mineral land should pass by any act of his Department, nor did it pass; the surveyor-general, by his certificate of approval, expressly reserved mineral lands, and yet, in face of the expressed intention of Congress and of every officer of the Government, who ever had anything to do with this grant, it is claimed that land, admitted and known to be mineral for more than twenty years, passed by the grant.

We respectfully submit that the questions submitted should be answered as follows:

First. The action of the Commissioner of the General Land Office and of the surveyor-general was not a decision that none of the lands included in Baca grant No. 4

were mineral lands, nor that the same were a valid location upon the ground covered by said grant of a selection of that tract.

Second. No.

Third. Yes.

All of which is respectfully submitted.

JOHN K. RICHARDS,
Solicitor-General.

L. F. PARKER,
Of Counsel for the United States.

No. 154.

MAR 2 1898
JAMES H. McKENNEY,
CLERK

Record Brf. of Atty. General (Petitioner) for U. S.

Filed Mar. 2, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

QUINCY A. SHAW, PLAINTIFF IN ERROR,
v.
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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REVISED BRIEF ON BEHALF OF THE UNITED STATES.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REVISED BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

This is an action in ejectment, instituted in the circuit court for the district of Colorado by the plaintiff in error against the defendant in error.

The declaration alleges title to a tract of land $12\frac{1}{2}$ miles square in Saguache County, Colo., "*including certain mineral-bearing property designated by the defendant*

as the Eastern Star Mine, with other mining lands adjacent thereto," and alleges, among other things, that plaintiff's title is based upon an act of Congress approved June 21, 1860, entitled "An act to confirm certain private-land claims in the Territory of New Mexico," and that under said act of Congress the heirs of Baca selected and located the lands thereinbefore described, including the premises in controversy, and that the location of the same was approved by the proper officers of the Land Department of the United States, and that said land was, by the surveyor-general of Colorado, thereunto duly authorized, certified to be nonmineral land; "and the plaintiff claims that, by virtue of said statute and the finding of said surveyor-general as to the nonmineral character of said land at the time of its selection and location, the title to all of said premises passed to the heirs of Luis Maria Baca, * * * notwithstanding the fact of subsequent discoveries of precious metals within the boundaries of the said Baca grant No. 4, hereinabove described."

The answer put in issue the title of plaintiffs and the fact of the approval by the proper officers of the United States of the location of the lands in controversy, and alleged, as a separate defense, that on the 24th day of April, 1876, the land in dispute was unappropriated public mineral land, and that on said day it was explored and located as mineral land under the laws of the United States.

The plaintiff, to sustain the issues on his part, introduced the following evidence of title:

(*a*) SECTION 6 OF ACT OF CONGRESS APPROVED JUNE 21, 1860, ENTITLED "AN ACT TO CONFIRM CERTAIN PRIVATE LAND CLAIMS IN THE TERRITORY OF NEW MEXICO," which is as follows (R., 27):

> SEC. 6. *And be it further enacted*, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as claimed by the town of Las Vegas, to select, instead of the land claimed by them, an equal quantity of vacant land, *not mineral*, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: *Provided, however*, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

(*b*) CONTRACT FOR DEED. JOHN S. WATTS TO WILLIAM GILPIN, DATED FEBRUARY 17, 1862. (R., 60.)

This IS AN AGREEMENT of sale and transfer of "one of said five grants or claims of land, estimated to contain 100,000 acres," under the act above cited.

(*c*) SELECTION OF WATTS AS ATTORNEY FOR THE BACA HEIRS, DECEMBER 12, 1862. (R., 31–33.)

The application to select this land was dated December 12, 1862, and was filed in the office of the surveyor-general of New Mexico on February 5, 1863, and was by the surveyor-general of New Mexico, forwarded to the surveyor-general of Colorado, which Territory had

in the meantime been created, and within the boundaries of which this land lay. On the last-named day the surveyor-general of Colorado transmitted this application to the Commissioner of the General Land Office, and his official letter of transmission concludes as follows:

> I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca floats and should locate it as this is located, for the reason that in his opinion it would cover rich minerals in the mountains.

(*d*) OFFICIAL LETTER, COMMISSIONER OF THE GENERAL LAND OFFICE TO SURVEYOR-GENERAL OF COLORADO, MARCH 13, 1863. (R., 33–34.)

By this letter the Commissioner acknowledges receipt of the letter of the surveyor-general of February 24, 1863, which inclosed the application of Watts, as attorney for the Baca heirs, to select this land, and in this letter the Commissioner says:

> It is necessary, before the application can be approved by this office, that it be accompanied by the certificates of the surveyor-general and the register and receiver that the land so selected as vacant and nonmineral; * * * especially should the character of the location as to minerals be *carefully ascertained* after the important statement of ex-Governor Gilpin, which you communicated in your official letter to this office.

(*e*) THE SURVEYOR-GENERAL OF COLORADO, OCTOBER 13, 1863, REPORTS APPLICATION OF GILPIN FOR SURVEY. (R., 34.)

In this letter the surveyor-general informs the Commissioner of the General Land Office that on October 5,

Gilpin, as representative of the heirs of Baca, filed in his office an application for the survey of Baca float No. 4, and that he wished an immediate survey made; and the surveyor-general further reports that he replied to Governor Gilpin, that he was forbidden by his instructions to make a survey of any grant situate more than 6 miles from existing lines of public surveys, and that it would be some time before the lines of survey would reach the location of this grant, and that he would order a survey and make a contract subject to the approval of the Commissioner; that Mr. Gilpin had deposited the money for the survey with the understanding that if the contract was not approved the money was to remain in the hands of the surveyor-general until the survey was finished, then to be paid to the deputy for work done, "*the survey being considered private and not official.*"

(*f*) DISAPPROVAL OF CONTRACT FOR SURVEY, NOVEMBER 2, 1863. (R., 35.)

In this letter the Commissioner uses the following language: "In your letter transmitting the application of the attorney for said heirs for the location of this claim you say, 'I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca floats and should locate it as this is located, for the reason that in his opinion it would cover rich minerals in the mountains.'" And the Commissioner then proceeds to reiterate his instructions, calling especial attention to those relating to the mineral or nonmineral character of the land.

(*g*) LETTER OF SURVEYOR-GENERAL TO COMMISSIONER OF THE GENERAL LAND OFFICE, DECEMBER 12, 1863, TRANSMITTING CERTIFICATE OF NONMINERAL CHARACTER OF LAND. (R., 35–37.)

In this letter the surveyor-general transmits to the Commissioner his certificate that the lands selected are "not mineral and are vacant," giving the reasons on which he bases this certificate. He then says, "I have refunded to Mr. Gilpin the money placed in my hands, and he has paid for the survey *as a private survey*, though he has permitted me to make an abstract of the field notes."

(*h*) LETTER FROM THE COMMISSIONER OF THE GENERAL LAND OFFICE REJECTING THE CERTIFICATE AS TO THE CHARACTER OF THE LAND. (R., 37.)

In this letter the Commissioner acknowledges receipt of the certificate and the letter inclosing the same, and again calls attention to his explicit instructions with reference to ascertaining the value of the land, and states that the evidence furnished by the surveyor-general is not sufficient, in his opinion, to prove that this selection does not cover valuable mineral deposits, and also again calls attention to the statement of Governor Gilpin as to the character of the land.

(*i*) LETTER OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, FEBRUARY 12, 1864, AUTHORIZING QUALIFIED APPROVAL OF THE SURVEY. (R., 38–39.)

In this letter the Commissioner, in order to avoid the difficulty arising from an unauthorized survey of the claim and to save the expense of a resurvey, suggests the following course: "The original field notes, duly

verified and authenticated, must be filed in the surveyor-general's office of Colorado. Upon bringing these to the usual satisfactory tests, and finding the same all regular and correct, you are authorized, in virtue of the aforesaid sixth section of the said act of June 21, 1860, to approve the said survey, and in this certificate of approval you will add the special reservation stipulated by the statute, 'not to embrace mineral land, nor to interfere with any other vested rights, if such exist.'"

(*j*) LETTER FROM COMMISSIONER OF THE GENERAL LAND OFFICE TO SURVEYOR-GENERAL, FEBRUARY 26, 1864, INCLOSING PAPERS.

This letter shows that Mr. Gilpin had deposited certain papers in the office of the Land Commissioner at Washington, including the application for the survey, estimated cost of the same, surveyor-general's receipt for amount deposited to pay for the survey as reported by the surveyor-general October 13, 1863, and a certificate of the register and receiver that the lands covered by grant No. 4 are not mineral and are vacant, and the field notes of the boundary lines of the above grant, together with a plat thereof. The concluding sentence of this letter is as follows: "These papers were deposited in this office by Mr. Gilpin, and are transmitted to you for such action as you shall deem proper in the premises, *in accordance with the views expressed in our communication to you, dated the 12th instant.*"

(*k*) FIELD NOTES OF THE SURVEY OF GRANT NO. 4. (R., 39–52.)

These field notes show that the survey was commenced on October 22 and concluded on November 4, 1863,

making thirteen days, including Sundays. The actual survey is shown to have commenced on October 24 and to have been concluded on November 3.

(*f*) Approval of field notes and survey. (R., 52.)

The field notes of the survey were approved by the surveyor-general of Colorado on March 15, 1864. The map of the survey was approved March 18, 1864, the latter approval being qualified thus: "Which have been examined and approved, subject to the conditions and provisions of section six of the act of Congress approved June 21, 1860." These were transmitted to the Commissioner of the General Land Office on March 29, 1864, and the letter acknowledging their receipt was written by the Commissioner on May 4, 1864.

On May 1, 1864, the heirs of Luis Maria Baca conveyed their interest in this property to John S. Watts, and on November 6, 1877, the property is conveyed to William Gilpin *in conformity with the covenants of the agreement above referred to*, dated February 17, 1862, and the plaintiff in this case deraigns title from Gilpin.

This concludes the documentary testimony as to the title of this land, all documents of a subsequent date introduced in evidence being merely descriptive or constructions of those referred to above, the most important of which is the letter of J. A. Williamson, then Commissioner of the General Land Office, to the surveyor-general of Colorado, dated March 24, 1879, which arose out of an application of William Gilpin for patent to the entire tract of land known as Baca Claim No. 4 in Colorado.

The Commissioner refuses the application, and, in giving his reasons for this refusal, attempts to construe the acts of his predecessors as conclusive against the Government upon the question of the nonmineral character of the land. This reasoning is practically reiterated in subsequent letters, one dated June 28, 1884, by N. C. McFarland, Commissioner, and the other dated June 8, 1889, by William M. Stone, Acting Commissioner; but none of these subsequent letters are based upon any hearing or testimony as to the character of the land, nor is any new finding made upon the question, but, on the contrary, it is shown by them all that they are mere expressions of opinion as to the legal result of acts of former officers of the Government.

At the conclusion of the testimony, the court instructed the jury that the plaintiff was not entitled to recover as to the mineral land in dispute, and the jury returned a verdict for the defendant under this instruction.

The case was taken by writ of error to the United States circuit court of appeals for the eighth circuit, and is pending in this court on a return to the writ of certiorari to that court.

The contentions of the parties may be stated in a few words. On the part of the plaintiff it is that by the act of Congress above recited, the selection by the heirs of Baca, and the survey and other proceedings by the officers of the Government, the Baca heirs, or their representatives, had acquired the absolute title to this property prior to the discovery of mineral thereon, and that the action of the officers of the Government, with refer-

ence to such selection and survey, operated as an adjudication and estoppel, as against the Government and those claiming under it, upon the question as to the mineral or nonmineral character of the land, and though the land is now admitted to be mineral, and hence excluded by the terms of the grant, yet by reason of the proceedings and adjudication above referred to the Government of the United States, and all claiming under it, are estopped to claim that the question as to the mineral character of the land is, or was in 1876—the time when mineral was discovered—open.

The defendant claims that there has been no adjudication as to the mineral or nonmineral character of the land; that no action has been taken by the officers of the Government which estop it to claim that the land is mineral, and hence not within the terms of the grant, and that the question as to the mineral character of the land being still open, and this land being admittedly mineral in character, is excluded from the grant; and hence the plaintiff showed no title.

This being the state of the record, the interest of the United States in this controversy is apparent, for if plaintiff's contention prevails the land in dispute, as well as other land of like character within the surveyed boundaries of the selection, passed by the grant, while if the defendant's contention be correct all such land remains a part of the public domain; and it, therefore, through its proper officers, has seen fit to ask permission of this court to file this brief in support of the contention of the defendant in error.

BRIEF AND ARGUMENT.

I.

This is an action in ejectment, in which the plaintiff must recover, if at all, on the strength of his own title. The complaint admits that the lands sued for are "mineral lands." The plaintiff must, therefore, show title to mineral lands. The grant on which plaintiff bases his right to recover, instead of being for mineral lands, is for "vacant land, *not mineral*."

Upon this simple statement of the case, it would seem that plaintiff can not recover, because he does not deraign title to mineral lands.

II.

But, although the mineral character of this land is a fact which, if it now exists, existed at the date of the grant and at the date of the selection, the plaintiff claims that, because this land was not known to be mineral at the date of the grant, at the date of the selection, and at the date of the survey and location, title passed to the grantees, notwithstanding the reservation in the grant. It goes without saying that the lands were the same when selected, surveyed, and located as they are now, and were, therefore, in fact "mineral" at that time. This contention of the plaintiff may then be reduced to this, that the act of Congress must be construed as granting all lands not known to be mineral at the time of the selection and location.

Is it permissible to so construe this act of Congress? We submit that it is not; first, because that would be to

interpolate a term not found in the act and to violate the rule which forbids the enlargement of public grants by implication; and second, because the circumstances attending the grant are inconsistent with such a construction.

At the date of this grant little was known of the territory then called New Mexico, and the mineral developments in the United States were then in a very primitive stage. Silver mining had not existed in the United States more than one year previous to the date of this grant, and the first discovery of precious metals in the Rocky Mountains antedated this grant but a very few years. The policy of the Government at that time, like that of all governments, was to encourage to the utmost the exploration for the discovery and development of the precious metals, and the intent of Congress, in incorporating into the act in question the reservation respecting mineral land, was in harmony with this well-known general policy. What were mineral lands and what were not could only be known through long, arduous, and expensive prospecting and experiment; it could not be determined by a mere examination of the surface.

It is respectfully suggested, therefore, that in view of this well-settled policy of the Government, and of the well-known difficulty of ascertaining the mineral or non-mineral character of the land, it was not the intent of Congress, in incorporating into this act the reservation in respect to mineral lands, to give to the heirs of Baca such a roving commission as would permit them to interfere with the exploration and search for the precious metals in the mountain ranges of the country, or with the

location and development of such mineral lands when found.

It could not have been intended by Congress that this reservation should only comprehend lands then known to be mineral. While mineral had then been discovered in many places in the Rocky Mountains, enough so as to render it presumable that mineral was generally distributed throughout their full extent, it was not and could not be known in what particular localities precious metals might be found, and in what they would not be found. To hold, under these circumstances, that the reservation applied only to known mineral lands, is to render such reservation meaningless and practically without force.

Nor could Congress have meant to reserve only lands not known to be mineral at the time of the selection, for such selection was the act of the heirs of Baca in which the Government had no voice and over which it had no control. Those heirs were at liberty to select such lands as they chose, and it certainly was not the intention of Congress that so important a reservation as this was made only to be ignored by a mere selection of the parties in interest.

Nor could Congress have meant to reserve only lands not known to be mineral at the time of the survey and location, for the surveyor-general was required by the act to survey and locate "the lands so selected by said heirs of Baca when thereunto required by them." The surveyor-general had no voice as to what lands he should survey, nor as to what lands he should locate. He was required by the act to survey and locate such

lands as had been selected by the Baca heirs whenever they should require him to do so. Hence it is, that up to the time of the location and survey, the Government had no right to interfere in any way with the right of the Baca heirs to select and have surveyed and located such lands as they might desire.

But it is contended by the plaintiff that the action and report of the surveyor is conclusive, and counsel for plaintiff in their brief quote at length from the report of the surveyor as to the nonmineral character of this land. Notwithstanding these quotations, however, and the apparent confidence with which counsel rely upon the report of the surveyor and the action of the surveyor-general, it is apparent from their brief and their entire argument that they rely upon the acceptance of the field notes of the survey and map by the Commissioner of the General Land Office as the final act necessary to vest this title.

While the Commissioner of the General Land Office and the Secretary of the Interior make use of these public surveys, no conclusive effect is to be given to them, either in favor of the Government or against it, in determining whether lands are mineral or nonmineral. The reason for this, and the general character of the Government surveys, are disclosed very clearly in the opinion of Secretary Smith in *Wescott* v. *Northern Pacific Railroad* (17 L. D., 274), where he says (p. 275):

> The act of May 18, 1796 (1 Stat., 464), now embodied in section 2395 of the Revised Statutes, prescribed many of the rules which are yet followed in surveying the public lands. It directed that the

land be laid off into townships 6 miles square, by running lines north and south, to be crossed by others running at right angles to them. The corners of each township were to be marked and also each distance of a mile between the corners. The townships were to be divided into sections of 640 acres each, by running through the townships, each way, parallel lines "at the end of every 2 miles, and by making a corner on each of said lines at the end of every mile." Thus the outlines only of every other section were run, the corner of the intermediate section only being then fixed, and the outline thereof being protracted on the plat when made.

Subsequently Congress directed that the lands be sold by half and quarter sections, and the surveyor-general was directed to thus divide the sections by north and south and east and west lines protracted upon the plats, it not being intended that he should "run the subdivisional lines." (2d Public Land Laws, 820; *ibid.*, 854.

Subsequently the Commissioner of the General Land Office issued a "manual of surveying instructions for the guidance of surveyors and their deputies. By this manual it was directed that the outlines of each section be actually surveyed and the quarter-section corners established on the line as run. This manual has been legalized by act of Congress, and is deemed to be part of every contract for surveying the public lands." (R. S., sec. 2399.) As the public lands are only surveyed by contract they must necessarily be surveyed according to the manual, and thus, indirectly, the law requires that the outlines of each section should be actually surveyed.

It results, therefore, that only the section lines or rather the outlines of the sections are run, the minor subdivisions not being surveyed in the field.

The surveyor-general in making his plats merely protracts these imaginary subdivisional lines in red ink upon the plats, connecting the opposite corners both ways, thus making the quarter sections; these, in turn, are again subdivided in like manner into quarter quarters or 40-acre tracts. (Public Domain, 184.) So that there is no law nor instructions requiring the surveyor, in his line of duty, to go anywhere than along the borders or outlines of the section he is surveying.

By the same act of 1796 (R. S., 2395, sec. 7) it is provided that "every surveyor shall note in his field book the true situation of all mines, salt licks, salt springs, and mill seats which come to his knowledge, all water courses over which the line he runs may pass, and also the quality of the lands."

It is under this last provision that the report of the surveyor is made, which creates the presumption referred to.

The surveyor, as a public officer, must follow the law, and that does not require him or afford him an opportunity to pass over the interior or body of the section he is surveying. He is directed to report the situation of "all mines" that "come to his knowledge," and all water courses over which "the line he runs may pass." He is not directed to search for mines or water courses, but to report such as come to his knowledge whilst passing along the outlines of the section he is surveying. This is all he is required to do in the discharge of his duty. The law nowhere says that the report thus made is to be conclusive of even matters of fact reported; and certainly it would be contrary to all rules of sound reason to hold that such a report is to be conclusive or even presumptive negatively—that is, of matters not reported.

The most that can be said in favor of such a report is that it raises a presumption as to the belief or opinion of the surveyor as to the matters of fact affirmatively stated by him. These instructions to the surveyor relate only to his report of "mines." He may or may not report that the lands indicate that valuable minerals are hid beneath their surface. Such indications are not "mines." A report to that effect, not being required by the law, is optional with him. Being something beyond his required duty, no conclusion of law arises from it. It is merely a statement of the officer, more or less valuable according to his opportunities of observation, and ought not to preclude the assertion of any right or the proof of the facts of the case as they really exist.

It has been seen how limited are these opportunities of observation, the officer merely passing over the confines of the section, with his attention more directly absorbed by the duties of his scientific profession and the necessity for absolute accuracy in his courses and distances. Even were he a geologist or mineralist, his opportunities of observation along the course of his lines would be the scantiest, and beyond those lines, or on either side of them, his duties do not carry, but prohibit him from going. So that, practically, the interior of the section, or that portion thereof not immediately along the line being run, is beyond the observation or knowledge of the surveyor, and his opinion in relation to the same can not be of much value. So that the report of the surveyor must necessarily constitute but a small element of consideration when the question is as to the true character of the land.

And this has been the ruling of the Department and the courts for a long time. See *Ode* v. *Markley*

(2 L. D., 847), where the subject is ably and exhaustively discussed and numerous authorities cited to sustain the views herein stated.

In the case cited it was a question as to the effect of report of the surveyor that certain lands were salines. After reviewing all the decisions and discussing the subject at great length, Secretary Teller said, on p. 851:

"These cases seem to be decisive of the issue raised in the case at bar, and to establish the rule that a notation of 'saline' on the plats, or its omission, is immaterial, and that no land but that in fact saline is reserved from agricultural entry. * * * The character of the lands is a question of fact, to be determined by due proofs, and the qualified party who first settles upon them, or applies to enter them, and otherwise conforms to the law, has priority of right when their nonsaline character is determined."

To the same effect is the case of *Robinson* v. *Forrest* (29 Cal. Rep., 317, 321); *Merril* v. *Dixon* (15 Nev., 401, 405, et seq.); *Morton* v. *Nebraska* (21 Wall., 660, 674). The surveyor's report in this case, therefore, has but little weight with me in its determination.

If the report of a regular deputy surveyor who runs the exterior lines of every section has but little weight with the Department in the determination of these questions, how much less weight should be given to the report of a surveyor who has only run the exterior lines of a piece of land 12½ miles square, and where the actual time occupied in so running these 50 miles of lines is only ten or eleven days?

No question is raised in this case as to the character or amount of precious metals necessary to make lands

mineral, for the allegation is that these lands are "mineral-bearing lands" and that "discoveries of precious metals" have been made within the boundaries of the grant. In other words, it is conceded by the declaration in this case that the conditions existed, whatever they may be, which were necessary to bring the land within the description of the reservation in the act. Nor does the fact, if conceded, that this is a grant *in præsenti*, in any way aid the plaintiff in this case, for, if the grant be *in præsenti*, the exception is also *in præsenti*, and no matter when the grant attaches, it can not attach to mineral lands, for they are not granted, but are expressly reserved.

III.

But it is said that this construction, or any construction which excludes lands in fact mineral from the operation of the grant, works a hardship, because it leaves the title to the lands forever uncertain, and liable to be defeated at any time by the discovery of mineral. As we shall attempt to show hereafter, this is one of the cases where "*nothing but a patent*" passes a perfect and consummate title, and as, before a patent can issue, there must be a finding and ascertainment by the Secretary of the Interior, or by one of his subordinates under his direction, that the facts exist which authorize the issuance of the patent, it is evident that before a patent can issue the question as to the character of the land under this grant must be passed upon by the Secretary of the Interior, or by some officer of that Department under his direction; that is to say, before a patent could issue under

this act of Congress it would be necessary for the Secretary of the Interior, or some subordinate under his direction, to ascertain whether the land claimed was vacant and whether the same is nonmineral.

The case of *Davis* v. *Weibbold* (139 U. S., 520) is cited by counsel for the plaintiff on this proposition. In this case Mr. Justice Field, quoting the language of Judge Sawyer in *Cowell* v. *Lammers*, says:

> There must be some point of time when the character of the land must be finally determined, and for the interest of all concerned there can be no better point to determine this question than at *the time of issuing the patent*.

And again, at page 523, the same justice quotes with approval the following language of Mr. Justice Lamar while Secretary of the Interior:

> *The issue of the patent* was a determination by the proper tribunal that the lands covered by the patent were granted to said company, and hence, under the proviso of said act, were not mineral at the date of the issuance of the patent.

And again, at page 524:

> *The grant or patent, when issued*, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exceptions stated.

But it is alleged by counsel for plaintiff in error that no patent was necessary in this case, and that no patent could issue upon this act of Congress, and hence that the language of Mr. Justice Field in the Weibbold Case is not applicable to the case at bar.

IV.

IS PATENT NECESSARY TO PASS A PERFECT AND CONSUMMATE TITLE UNDER THE ACT?

It is, of course, beyond question that Congress may grant lands so as to convey a legal title without patent, and it is also true that many acts of Congress granting lands have been passed which are self-executing and which are of themselves equivalent to conveyances, but it is a general rule, and one which has few exceptions, that nothing but a patent passes a perfect and consummate title from the Government.

In the case of *Bagnell* v. *Broderick* (13 Peters, 436 L. C., 450) the court says:

> Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the whole legislation of the Federal Government in reference to the public land declares the patent the superior and conclusive evidence of legal title. Until its issuance the fee is in the Government, and by the patent it passes to the grantee.

In the case of *Wilcox* v. *Jackson* (13 Peters, 436, L. C., 516), this court says:

> We think it unnecessary to go into a detailed examination of the various acts of Congress for the purpose of showing what we consider to be true in regard to the public lands, that, with the exception of a few cases, nothing but a patent passes a perfect and consummate title. One class of cases to be excepted is where an act of Congress grants land, as is sometimes done, in words of present grant. But we need not go into these exceptions; the general rule is what we have stated.

In the case of *Carter* v. *Ruddy* (166 U. S., 493) the court had under consideration an act of Congress, approved July 17, 1854 (10 Stat. L., 304). By this act the President was authorized to exchange with certain half-breed Indians, for a tract of land to which they were entitled, other lands in lieu thereof, and upon relinquishment by them to the United States of their interests in their lands, the Commissioner of the General Land Office was authorized to issue to such half-breed Indians certificates or scrip for the same amount of land to which each individual would be entitled in case a division of their lands was made, and the act contained this provision: "Which said certificate, or scrip, may be located upon any lands within said reservation not now occupied by actual and *bona fide* settlers, etc."

This act created indemnity grants, or floats, similar in every particular, except as to the reservation of mineral, to that created by the sixth section of the act of 1860, and the interest acquired by the half-breed Indians named in the act, in the lands upon which these certificates were located, is identical, as a matter of law, with the interest of the heirs of Luis Maria Baca in the land selected by them under the act of 1860, the only difference being that, in one case, the right to select was evidenced by certificates issued by the Commissioner of the General Land Office, while in the other the right to select was given by the act of Congress itself. The legal status of the holders of these certificates under the above-recited act, after the same had been located and before patent was issued, was before this court in the above case, and this case seems to be decisive of the one at bar

in respect of this question. The contention there was, as it is here, that the location of the scrip operated to transfer the legal title of the land so located to the locator; that no patent was necessary, and that the legal title was in him by virtue of the act of Congress and the certificate and the location. With reference to this, Mr. Justice Brewer, speaking for the court, says:

> While it is true that the act of 1854 does not, in terms, provide for the issue of a patent, and simply authorizes the location of the scrip upon any public land, yet the general rule is that a patent is necessary for the transfer of the legal title.

He then cites with approval the quotation cited from *Bagnell* v. *Broderick* and *Wilcox* v. *Jackson*, and disposes of the question thus:

> There is nothing to exempt this case from the ordinary rule that a patent is necessary to convey the legal title; that the certificate and location create at best but an equitable title.

In the case of *Stoneroad* v. *Stoneroad* (158 U. S., 240), where a grant confirmed by the first section of the act of June 21, 1860, was under discussion, the court says:

> At the time of the passage of this act, and for a long time prior thereto, the general laws of the United States confided to certain administrative officers the duty of surveying not only the public lands, but also private land claims. The practice of the United States in dealing with the public domain and all governmental grants of lands is to survey and *issue a patent*.

It being the general rule that nothing but a patent will operate to divest the United States of its legal title

to the public domain, there is nothing in this case which makes it an exception to that general rule. Every act of Congress which has been held to be an exception to this rule contains language evidencing an intention on the part of Congress that the act itself should operate to transfer the title and should be self-executing. Such grants are included in other sections of the very act under discussion. Section 1 of the act provides: "That private land claims in the Territory of New Mexico, as recommended for confirmation by the surveyor-general of that Territory, * * * *be and they are hereby confirmed.*" These words, or their equivalent, have always been held to evidence an intention on the part of Congress to make a present grant; that is to say, the act of Congress containing these words is self-executing. Section 3 of this act contains the same language.

Many cases are cited construing grants of this character, and as the rules justly laid down in these cases are invoked by counsel for plaintiff in error in this case, it may not be amiss to examine the granting words contained in the acts thus construed, with the view of ascertaining whether the words used by Congress in the sixth section of the act of June 21, 1860, should receive the same construction.

The first case cited is *Rutherford against Greene's heirs* (2 Wheaton, 197). The grant under discussion in that case was made by the State of North Carolina in 1782, and provided "That twenty-five thousand acres of lands shall be allotted for and given to Major-General Nathanael Greene."

In pursuance of the direction of the act, commissioners allotted twenty-five thousand acres of land to General Greene, and caused the tract to be surveyed.

On the 12th of April, 1783, the general assembly of North Carolina passed "An act for opening the land office," the provisions of which, it was contended, revoked or recalled the gift made by the act of 1782 to General Greene. In 1784 an act was passed authorizing the issuance of a grant or patent to General Greene, and pursuant to this act the grant or patent was issued, and the question at issue was, (1) whether the act of 1783 operated as a revocation of the grant to General Greene, and (2) whether the act of 1782 did not operate to vest such a title in General Greene as would support the grant paper or patent issued under the act of 1784; and the court held that the act of 1783, when properly construed, did not operate to revoke the gift of 1782, that the rights vested in General Greene by the act of 1782 were not impaired by the act of 1783, and, to use the language of the court, "and that it (the title) *is completed by the grant which issued in pursuance of the act of 1784*, and which relates to the inception of the title."

This is all there was in that case. There was no condition or reservation in the grant, and no question analogous to the question in this case arose or was decided in that case, unless it be in that portion of the opinion quoted above, which clearly indicates that in the opinion of the court the issuance of a grant was necessary to "complete" the title.

The next case cited is *Grigson's Lessee against Astor* (2 How., 310). The grant under discussion in that case

was approved February 1, 1823 (3 Stat. L., 724), and the granting clause is as follows:

"Such persons *are hereby confirmed in their claims*, agreeably to any surveys heretofore made," etc. These words, so well understood at this date, are self-executing and are sufficient to show an intention to make a present grant, and are entirely different from the words used in the act of Congress now under discussion.

The case of *Strother against Lucas* (12 Peters, p. 454) construed the provisions of an act of Congress approved June 13, 1812, and the words of the granting clause, construed by the court in the excerpt of the opinion quoted in that case and in the brief of counsel for plaintiff, are as follows:

> That the rights, titles, and claims to town or village lots, etc., shall *be, and the same are hereby, confirmed* in the inhabitants of the respective towns and villages aforesaid.

The statute before the Supreme Court in the case of *Chateau against Eckert* (2 How., 372) is to be found at the Fifth Statute at Large, page 126, and the granting words are as follows:

> That the decisions in favor of land claimants made by the recorder of land titles in the State of Missouri, and the two commissioners associated with him * * * *be, and the same are hereby, confirmed.*

In *Ryan and others against Carter and others* (93 U. S., p. 78), the court had under consideration the act of June 13, 1812 (2 Stats., 748), and the words construed and held to operate as a grant *in presenti* are as follows:

> That the rights, titles, and claims to town or village lots * * * adjoining and belonging to the

> several towns or villages, * * * shall *be, and the same are hereby, confirmed* in the inhabitants of the respective towns or villages aforesaid.

The granting words in all these acts, as well as in the subsequent acts granting lands to railroads, which have been repeatedly construed by this court to operate as self-executing grants, have all contained the words "be and are hereby granted," or the words "be and are hereby confirmed," or words having equivalent meaning and evidencing the same intention.

In the Union Pacific grant of July 1, 1862 (12 Stat. L., 489), the granting words are "That there *be and is hereby granted* to said company," etc.

In the Northern Pacific Case (see act of July 2, 1864, 13 Stat. L., p. 365) the granting words are "That there *be and hereby is granted*," and in the Atlantic and Pacific Case (see act of July 27, 1866, 14 Stat. L., 293) the granting words are identical with those above quoted.

As is said by Mr. Justice Davis, in the case of *Railroad Company against The United States* (92 U. S., p. 733; L. C., p. 741):

> "*There be and is hereby granted*" are words of absolute donation and import a grant *in praesenti*. This court has held that they can have no other meaning, and the land department on this interpretation of them has uniformly administered every previous similar grant.

A comparison of the several acts of Congress, which have been construed by this court as self-executing grants *in praesenti*, with the act of 1860, giving permission to the heirs of Baca to select a quantity of vacant land, not mineral, in the Territory of New Mexico, will show a

broad line of demarcation, and will, we think, show conclusively that it was not the intention of Congress, by the act of 1860, that the absolute title to this land should pass to the grantees and the Government be concluded, without some opportunity on the part of its officers to pass upon the character of the land.

It will be noted that the substantial language of the act is as follows:

> That it shall be lawful for the heirs of Luis Maria Baca to select, instead of land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, etc.

In the Northern Pacific grant occurs the following language:

> Whenever * * * any of said sections or parts of sections shall have been granted, sold, reserved, * * * or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior.

In the Atlantic and Pacific grant (14 Stat. L., p. 295) occurs exactly the same language.

And this clause of these statutes is, as is the act of 1860, purely and simply an indemnity grant. These indemnity clauses have never been held to operate as self-executing grants, and have never been considered as effectually passing the title out of the Government until the lands have been selected and such selection formally approved, or the land patented, by the officers of the United States. That there is a broad distinction between "granted lands" under grants which are self-executing

and take effect *in præsenti* and "lieu" or indemnity lands, as to which title passes only when the same have been selected and such selection approved, is well settled by this court in the case of *Wisconsin R. R.* v. *Price County* (133 U. S., 496).

That this has been the opinion and practice of the Interior Department is shown by the decision of Secretary Noble in *Central Pacific Railroad Company* v. *Valentine* (11 L. D., 238–246):

> The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company.
>
> By reason of this jurisdiction it has been the practice of the Department, for many years past, to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of patent. Moreover, I am informed by the officers in charge of the mineral division of the Land Department that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent, or certification, where patent is not required. This practice having been uniformly followed and generally accepted for so long a time, there should be, in my judgment,

the clearest evidence of error, as well as the strongest reasons of policy and justice, controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property.

V.

ESTOPPEL. RES ADJUDICATA.

Has the question of the nonmineral character of this land been passed upon by competent authority, so as to estop or bind the United States?

In examining questions relating to former adjudications or estoppel by the record, the first question to discuss is that of jurisdiction; that is to say, we should first ascertain what court, body, or officer has power under the law to make the adjudication or create the estoppel alleged.

From plaintiff's brief it is not exactly clear where counsel think the jurisdiction to decide this matter rests. On pages 19 and 20 of their supplemental brief counsel use this language: "The statute specifically designated an officer of the Government, to wit, the surveyor-general, to make survey and location of the lands selected. The use of these words, taken in this connection, must mean that the surveyor-general was not only to officially determine the boundaries of the land, but to confine the selection to the character of land authorized to be taken. His official approval, therefore, must amount to a decision that the land by him surveyed and located is of the character designated by the statute."

This extract from the brief would indicate that it was the opinion of counsel for plaintiff that the power to

adjudicate this question and the power to create this estoppel, as against the Government, rested with the surveyor-general under the act. It is fairly inferable from the statements of counsel on page 16 of the same brief and on page 52 of their original brief that the power to make this adjudication and create this estoppel is with the Commissioner of the General Land Office.

In order that there may be no confusion as to this question, it is perhaps best to examine it as an original one.

The act of Congress itself does not expressly authorize any person to pass upon this question and does not point ut any method by which the United States can be protected against the selection of any lands that the grant claimants may see fit to select. The act provides that "it shall be lawful for the heirs of Baca * * * to select * * * an equal quantity of vacant land, not mineral, in the territory of New Mexico, to be located by them in square bodies, not exceeding five in number."

Under this act the power to make selection of the land to satisfy this grant is vested in the heirs of Baca. They are the sole judges of what lands are to be selected and located. That the mere selection and location of the lands by the heirs of Baca could not operate as an adjudication or estoppel against the Government seems to be axiomatic, if it be borne in mind that they are the sole judges of the land to be selected and located. Can any man be a judge and make an adjudication in his own favor against another? Can any man create an estoppel against another by any transaction in which he himself is the only participant? Could the heirs of Baca by their own conduct,

ignoring the very provisions and limitations which Congress had incorporated into the act for the protection of the Government in the transaction, gain an advantage to themselves and against the Government? These questions seem to furnish their own answers; and with reference to the powers conferred on the surveyor-general by this act, it seems to me that we are left in the same predicament. He is required "to make survey and locations of the lands so selected by said heirs of Baca * * * when thereunto required by them." He has no discretion in the matter, but is commanded by the act to survey and locate such lands, and such lands only, as have been selected by the Baca heirs.

It will thus be seen that the act itself contains no express provision for an adjudication such as is set up by the plaintiff in this case. The only parties expressly authorized to participate in the selection and location of this land by the act itself are the Baca heirs and the surveyor-general. They are permitted to select such land as they please, and he is required to survey and locate the lands so selected, the Government being left out of the question altogether and having no voice in the selection and no control over the survey, except that the same must be accurate and in accordance with the rules of the Department.

It can not be that Congress intended that the mere selection of the lands by the Baca heirs and the survey and location of the lands thus selected by the surveyor-general should of itself operate as an adjudication or as an estoppel against the Government as to the character of the land. Neither the Government nor any of its

officers have had an opportunity to be heard or to adjudicate upon the matter.

Resort must then be had to the general laws of the land in order to ascertain where rests the power to adjudicate upon matters of this kind and to make a finding which shall operate as an estoppel against the Government. Such an authority is found in sections 441, 453, and 2478 of the Revised Statutes.

By section 441 "the Secretary of the Interior is charged with the supervision of public business relating to the following subjects * * * the public lands, including mines."

By section 453 "the Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands, or in anywise appertaining to such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government."

And by section 2478 "the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title (public lands) not otherwise specially provided for."

Here, then, is found a tribunal and here the power to adjudicate upon the question as to the character of this land, and an adjudication by the Secretary of the Interior, or by the Commissioner of the General Land Office,

under his direction, is binding upon the Government. No other person or tribunal is vested with this power.

Recognizing this to be true as a legal proposition, counsel for plaintiff have sought to establish such an adjudication—

(*a*) By the letter of February 12, 1864, authorizing the surveyor-general to approve the survey;

(*b*) The approval by the surveyor-general of the survey and the map, and

(*c*) By the receipt and filing in his office of the field notes and map, with approval indorsed thereon.

First, as to the letter of February 12, 1864. It will be remembered that the status of affairs at this time was this: That a private survey had been made by Sheldon and paid for by Gilpin, which had no validity as against or binding force upon the Government or anyone else. It is assumed, on page 16 of plaintiff's supplemental brief, that Governor Gilpin was in the office of the Commissioner of the General Land Office when this letter was written, or had been there while this subject was being considered, and it is, perhaps, a fair inference that this letter was written at the suggestion of Governor Gilpin, in order to save him the trouble, delay, and expense of a second survey. This authority was given by the Secretary outside of the regulations of his Department, and is expressly stated to be as a means of "avoiding the difficulty which exists with reference to this survey." It will be remembered that the Commissioner at that time had before him, and evidently had in mind, his former correspondence with reference to the mineral character of

this land and to the knowledge or belief, on the part of Mr. Gilpin, that this was mineral land. Hence the condition of permitting the surveyor-general to approve a survey which was expressly stated to be irregular. That condition is as much a part of this letter of authority as the authority itself, and by it the surveyor-general was directed in his certificate of approval to "add the special reservation stipulated by the statute, but not to embrace mineral land, nor to interfere with any other vested rights, if such exist." Without this latter authority the surveyor-general had no power to approve this private survey at all. With it he had power to approve it only with the qualification specified in the letter of authority.

It is sought by counsel for plaintiff to construe this qualification as applying to known mineral lands only, and not to such as might be discovered to be mineral subsequent to the selection, survey, and location and before the issuance of patent, and he seeks to draw this conclusion from the use of the language, "other vested rights," and says "the word 'other,' by the inexorable rules of language, must carry the idea of 'vested rights' back to the mineral land referred to in the same sentence." As a grammatical proposition, this is undisputed, but it does not in any way aid counsel or lead to the conclusion reached by them. The United States Government has a "vested right" in all mineral underlying the public domain, and it is unnecessary that rights shall have been vested in any private individual in order to be protected by this provision of the statute; in fact, the very object of this provision was to protect the

"vested right" of the Government in the mineral land of the country, and it is to this "vested right" that the word "other" undoubtedly relates.

As has been said, the authority of the surveyor-general to approve this survey was limited by this letter of authority. Whether the Commissioner had in his mind the suspicion which grew out of Gilpin's communication to Surveyor-General Chase, or whether he had in mind the fact that this survey was a private survey, paid for by and made under the direction of Mr. Gilpin, the instructions given to the surveyor-general are plain. Whatever of authority he had as to that private survey he had under those instructions. The plaintiff must take these as a whole or repudiate them altogether. He can not accept that part which is favorable to him and reject that portion which he deems will prejudice him. If he repudiates those instructions he has no official survey at all; if he accepts them and the certificate made under them, then the reservation of the mineral land remains in these proceedings, from the granting act to the last official act in connection with the land—the certificate of approval by the surveyor-general.

As has been said, the granting act under discussion makes no express provision for the ascertainment and determination of the question as to whether lands selected, surveyed, and located are of such a character as to be subject to the grant. It has also been seen that the general law does make provision for such ascertainment and for the protection of the Government in respect of these, as well as all other questions pertaining to the public lands, and that jurisdiction of such question is vested in

the Secretary of the Interior, or the Commissioner of the General Land Office, under the direction of the Secretary.

This act, then, will be read in view of this provision of the general law. It was certainly not the intention of Congress that the Government should be concluded as to the character of this land until the question had been determined by some properly constituted authority.

Reading this act then in view of these provisions of the general law, and it will be construed to mean that the selection and location of these lands by the heirs of Baca must be under the direction of the Secretary of the Interior, and of course subject to the General Land Office.

If this be a proper construction of the act, it is impossible to distinguish its meaning from that of the indemnity provision in the numerous grants in aid of the construction of railroads made by Congress. For instance, the indemnity provision of the act granting lands to the Northern Pacific Railroad is as follows:

> Whenever * * * any of said sections, or parts of sections, shall have been granted, sold, reserved, * * * or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior.

In the Atlantic and Pacific grant (14 Stat. L., p. 295) occurs exactly the same language.

In these grants, as well as in the one under discussion, the land is to be *selected* by the beneficiary *in lieu* of other lands otherwise disposed of, and to which the beneficiary

would but for such disposition have been entitled. The nature of the right or title passing by such provision was thoroughly settled by this court in the case of Wisconsin Railroad Company *v.* Price *supra*, in the opinion in which case the court says: "For such lands no title could pass to the company, not only until the selections were made * * * but until the selections were approved by the Secretary of the Interior."

And again, "the approval of the Secretary was essential to the efficiency of the selections and to give to the company any title to the lands selected. His action in the matter was not ministerial, but judicial. He was required to determine whether the particular indemnity lands selected could be properly taken for this purpose."

In the course of this opinion the court further declared that the Secretary must determine whether any of the lands selected were otherwise appropriated, and that such action was required for the protection of the United States against improper appropriation of its lands; that until such selections were approved there were no selections in fact.

So in this case it was not the duty of the Secretary to determine whether these lands "were vacant" and "not mineral," the language of the act requiring that only such lands could be selected.

It must be conceded that the jurisdiction to determine whether the lands selected were vacant or nonmineral vested somewhere other than in the grantee, and it seems to us that there can be no question that it was the intention of Congress to make this grant that the jurisdiction

and power to decide this question should rest with the Secretary of the Interior, where the general law had placed it.

The condition of this title, as shown by the act of Congress and the proceedings with reference to the mineral character of this land, as has already appeared, is as follows: The granting act reserved the mineral; the authority given by the Commissioner of the General Land Office to the surveyor-general directed him to include the reservation as to the mineral land in his certificate; the reservation *was* included in his certificate, and the plaintiff in error occupies the unenviable position of asking for a judgment based upon the existence of a fact which he alleges in his pleading is not a fact. He claims title to a tract of land as being *nonmineral*, which, by the allegations of his complaint and his own proof, is shown in fact to be *mineral* land. He claims title to a tract of mineral land as having been granted by an act of Congress which expressly excluded mineral land from its operation. He claims an adjudication by the Commissioner of the General Land Office, when that officer expressly declines to pass upon the question, and expressly provides that mineral land shall not be affected. He claims that, although Congress did not intend to grant mineral land and did not grant it, and although the Commissioner of the General Land Office required that it should be expressly reserved in the certificate of approval of the survey, and although it was expressly reserved in the certificate, he owns it nevertheless, because he succeeded in having it included within the surveyed boundaries of the lands he selected.

It is conceded by counsel for plaintiff in error that the approval by the Commissioner of the General Land Office, either express or implied, is essential to make the selection under this act complete, and it is argued that, as the Commissioner of the General Land Office acknowledged the receipt of the survey, with the approval of the surveyor-general indorsed thereon, on May 4, 1864, and took no formal action by way of disapproval, his approval of the action of the surveyor-general will be implied.

With reference to this argument it must be remembered that the approval of the surveyor-general in itself included the reservation of mineral land, and if the Commissioner of the General Land Office will be held to have approved the action of the surveyor-general, then such approval must go to the entire certificate. In other words, plaintiff can not contend that inaction on the part of the Commissioner of the General Land Office operated as a passive approval of the certificate in so far as said certificate validated the unauthorized survey, and rejected that portion of the certificate which recited that it was subject to the conditions and provisions of section 6 of the act of Congress approved June 21, 1860; that this certificate approval must stand as a whole or it must fall altogether. With it the mineral land is reserved, even though within the land surveyed; without it, plaintiff has no pretense of any authorized survey or location by the officers of the Government.

VI.

THE BARDEN CASE.

A distinction is sought to be drawn by counsel between land grants made to railroads and the grant under discussion, in respect of the mineral reservation. This question was before Secretary Noble, with reference to this identical section, on a motion for rehearing in the case of Baca float No. 3, and the opinion of that officer is so complete an answer to the contention of counsel that I take the liberty to quote from it at length:

> The evident intention in all these acts was to prevent the title to mineral lands from passing thereunder, and to express that intention the language in the act last mentioned (section 6 of the act of June 21, 1860) is just as clear as that used in the others (acts granting lands to railroads). The language used in the act under consideration should be given the same prohibitive force as is accorded to the other acts above mentioned. If this be true, and I do not think it can be successfully controverted, it follows that the reasoning in the Valentine Case applies with equal force to the case now under consideration and that the rule there laid down should be followed here. (13 L. D., 624.)

The Valentine Case referred to is the case of the *Central Pacific Railroad Company* v. *Valentine* (11 L. D., 238), in which case the Secretary had under consideration the grant to the Central Pacific Railroad Company, and the language excepting mineral land from the operation of the act is substantially the same as that construed in the Barden Case.

It is conceded by the Government that there must be some point of time when the character of the land must be finally and officially determined, and when the title shall be deemed, in the absence of fraud, to have passed from the Government under this act. The contention of the United States is that the title could not pass until the selection of the land, its survey, and all proceedings appertaining to the matter had been passed upon and approved, and the nonmineral character of the land determined by the Interior Department, and a patent issued, carrying the whole into effect.

The act of Congress which is the basis of plaintiff's title is in harmony with the provisions of section 453 of the Revised Statutes, which reads:

> The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands, or in any wise appertaining to such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government."

This provision contemplated that in all cases, unless there were express provisions to the contrary, grants of land should be carried into effect by the Interior Department by the issue of a patent for the conveyance of the title.

There can be but one alternative of the contention just stated, which is that the title rests wholly upon the act of Congress, the selection by the Baca heirs and the Sheldon survey.

That is to say, if no patent was required to pass the final title, it was because the act of Congress was self-executing and intended to be the only evidence of title given to the Bacas, and that the survey was only required to identify on the ground the particular tract of land to which the act of Congress, as a conveyance, was applicable. The act of Congress, standing alone and construed literally, gave the Commissioner of the General Land Office and the Secretary of the Interior no authority in the matter whatever. If these officers had any authority in the premises, it must have been derived from the provisions of section 453 of the Revised Statutes. If that section was not applicable to the particular case, then they had no jurisdiction of any part of the proceedings; if it was applicable, then they had complete jurisdiction of the entire proceedings and a patent was necessary to complete those proceedings.

So, therefore, the title must depend either on the act of Congress and the survey, or it must depend upon a atent issued under the authority of section 453.

The act of Congress and the survey do not carry the mineral land.

The act of Congress expressly reserved the mineral, and the statement of that fact ought to be sufficient to determine the whole case. The *fact* being that the land is mineral land, no person ever got a deed of it from the Government. Now, a *fact* is from everlasting to everlasting. In this case it is as old as the eternal hills and as rock-ribbed as the mountains. It was the same fact when this act of Congress was passed that it is to-day.

The Sheldon survey could not convey the mineral land. The Sheldon survey can not be held to be of the nature of a determination that none of the land within the lines he ran were mineral lands, and this for two reasons—he was not authorized to make any such determination, and he did not pretend to make such determination.

If the court will examine the field notes and plat of that survey copied in the record it will see that the mountains in which are the mineral lands are in the east portion of the tract. It will further see that the east line of the survey was only run 3 miles to the north from the southeast corner, and was abandoned when the mountains were reached. At this point the surveyor makes the following notes:

> From this point to the northeast corner of the grant the mountains are very rugged, precipitous, and deeply covered with snow. The line, if at all, could be carried through only with great difficulty and with a result, with respect to accuracy, which could serve but little to any practicable purpose. I therefore deem it advisable, as, indeed, it seems compulsory, to abandon the line at this point.

The surveyor then proceeds to close up his report of the survey with what he terms a "general description," and the concluding sentence of that description is:

> I saw no indications of the precious metals or metals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle, set forth in the notes.

That is all he had to say as to mineral lands.

It is proper to suggest that this was a survey that did not survey. *Nine miles* of the only part of the line which might be supposed to pass over mineral land was not run. So far as shown, the surveyor did not go over a foot of that part of the tract. It was deeply covered with snow, so he could not have seen mineral if it had been exposed on the surface of the ground.

The only "finding of fact" or "determination" respecting the mineral or nonmineral character of the land, either which he did survey or which he did not survey, is contained in the expression, "I saw no indications of mineral." He does not make of himself a competent witness. He fails to show that he knew anything about the matter. His statement, if taken as evidence under oath, would not be considered by any court as sufficient to sustain a finding that the land was nonmineral. As a judge of the question, he had no evidence before him on which he could act, and he did not act.

Especially is this true in view of the fact, as stated by Justice Smith in the Winscott Case, *supra*, that the surveyor "is not directed to search for mines, but merely to report such as come to his knowledge while passing along the outlines" of the land he is surveying, and that "the law nowhere says that the report thus made is to be conclusive even of matters of fact reported, and it certainly would be contrary to all rules of sound reason to hold that such a report is to be conclusive, or even presumptive negatively, that is, of matters not reported."

VII.

WAS THE LETTER OF COMMISSIONER WILLIAMSON IN 1879 AN ADJUDICATION AS TO THE CHARACTER OF THIS LAND?

This letter purports to be a decision of the Commissioner of the General Land Office upon the application of Hon. William Gilpin for a patent to the tract of land known as Baca Claim No. 4, and in so far as it is decisive of the question of issuing a patent, it is entitled to great, if not controlling, weight.

The status of this claim at this time was as follows: The act of Congress was passed in 1860. In 1863 selection and the Sheldon survey was made, and in 1864 the survey was approved, subject to the conditions and provisions of the act. It will be noted that in all these proceedings the Commissioner of the General Land Office carefully avoided any decision as to the mineral character of the land and had expressly required that the surveyor-general should do likewise. Hence the desire of Governor Gilpin for some action on the part of the Government which would operate as an adjudication of this question was very natural, and the application for patent was evidently the outcome of this desire.

This being the status of affairs, if the Commissioner had granted the application and had recommended that patent issue, and such recommendation had been carried out, this would, under all the authorities, have operated as an official adjudication that the land was of the character which passed by the grant. But such was not the

decision of the Commissioner. On the contrary, *he refused a patent*, and, so far as the *record* discloses, this matter stands thus: The claimant made application to the Commissioner for a patent, that patent was refused, and this is all there is to the adjudication.

By an adjudication the Government is bound, *but the reasons given by the Commissioner* for an adjudication should be given such weight only as their own reasoning entitles them to. As such reasoning is contrary to the settled practice of the Department and contrary to the repeated decisions of this court, it seems to us that its length and the space which it occupies in the brief of counsel are its principal recommendations to notice. It seems hardly necessary to cite authorities upon the proposition that this court is not bound by the decision of any officer of the Land Department upon a question of law, but the opinion of Mr. Justice Daniels, in the case of *Irvin* v. *Marshall* (20 How., 567), states this proposition so succinctly that it may not be out of place to quote a portion of that opinion:

> It has been argued that it is the practice of the officers of the Land Office to receive the certificate of purchase as presenting upon its face the only evidence of title, and that those officers will recognize no other evidence of title but this certificate. Of the practice or the opinion of the officers of the Land Department no evidence is exhibited upon this record. But, supposing these to be in accordance with the above suggestion, they could by no means control the action or the opinion of this court in expounding the law with reference to the rights of parties litigant before them; and this they must

> do, in accordance with their own convictions, uninfluenced by the opinions of any and every other department of the Government.

What has been said with reference to the letter of Commissioner Williamson applies with equal force to the subsequent letters of Commissioner McFarland and Acting Commissioner Stone, which are founded upon and are mere repetitions of Williamson's letter.

It may not be out of place to review some of the authorities cited by counsel for plaintiff in error.

In the case of *Stark* v. *Starrs* (6 Wall., 418), the court had under consideration the donation act of Oregon, as it is called, in the fourth section of the act of Congress, approved September 27, 1850 (9 Stat. L., 497), and the language of the act is, "*there shall be, and hereby is, granted* to every white settler," etc. In the course of the opinion the court says:

> The right to a patent, when once vested, is treated by the Government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants.

Applying this proposition, which is quoted at length in the brief of counsel, to the case at bar, it is proper to inquire what is necessary in order that the "right to a patent" should have "vested" in the heirs of Baca or their representatives. It was necessary that these heirs should have selected *vacant nonmineral* land within three

years from the date of the act of Congress, and that the same should have been surveyed and located. One of the facts necessary before the right to a patent vests is that the land is nonmineral, the very question here under discussion. The right to a patent to mineral land never has vested in the heirs of Baca or their representatives, and, as it never has vested, the Government is under no obligation and the officers of the Government have no right to deal with these lands as though a patent had issued.

It is true that a patent, when issued, relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants, but this relation operates only upon such lands as were the *subject of the grant*, and does not operate to cut off intervening investigation by the Government in order to see whether the lands in dispute were or were not of the character covered by the grant.

In the case of *Davis, administrator, against Wiebold* (139 U. S., 507), the contest was between a *patentee* under the town-site law and one claiming under a *subsequent patent* under the mining laws of the United States, and the question at issue was thus stated by Mr. Justice Field, who delivered the opinion:

> When the entry of the town site was had, *and the patent issued*, and the sale made to the defendant of the lots held by him, it was not known—at least it does not appear that it was known—that there were any valuable mineral lands within the town site, and the important question is whether in the absence of this knowledge the defendant can be deprived under

> the laws of the United States of the premises purchased and occupied by him because of a subsequent discovery of minerals in them and the issue of a patent to the discoverer.

This extract from the opinion shows how foreign discussion of that case is to any question involved in this.

In the case of *Defferback* v. *Hawke* (115 U. S., 392), the same judge, in discussing a similar question, uses language showing that the date of the patent is the date at which the right to mineral lands not known to be mineral accrues to the settler. In this case the mining claim was located and the land bought before the town site was located or applied for, and in discussing the question the court uses the following language:

> It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and *patented by the Government* under the preemption laws, may be found, years *after the patent has been issued*, to contain valuable minerals. Indeed this has often happened. We therefore use the term *known* to be valuable at the time of sale to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made *and the patent issued*.

In the case of *Ryan against Carter* the statute, instead of being "quite similar" to the one now under discussion, uses this language:

> That the rights, titles, and claims *shall be, and the same are hereby, confirmed to* the inhabitants of the respective towns or villages, etc.

In the case of *Menard against Massey* (8 How., 293), the only question was as to the boundaries of the grant,

and the only matter as to which the United States was held to be concluded was that properly within the powers of the surveyor, namely, the fixing of the boundary lines. This was purely a ministerial act, and involved no decision or adjudication as to the character of the land, nor did it involve the exercise of any judicial or quasi-judicial function.

This is also true of the cases of Cousin against Bane, executor (19 How., 202; Frazier against O'Connor (115 U. S., 102); McCreery against Haskell (119 U. S., 327), and Tubbs against Wilhoit (138 U. S., 134).

In the case of *Langdeau* v. *Hanes* (21 Wall., 521), the granting act was in the usual form, showing an intention that it should execute itself, the words used being "*be, and the same are hereby, confirmed.*"

In the case of *Ryan against Forsythe* (19 How., 334), the General Land Office had recognized and approved the survey by the issuance of a patent.

The citation of counsel from the case of *Stark against Starr* (6 Wall., 413) would have been of more assistance to the court had he extended it a few lines. Counsel quotes as follows:

> The right became perfected when the certificate of the surveyor-general and accompanying proofs were received by the Commissioner of the General Land Office *and he found no valid objection to them.*

If counsel had taken time to read a little further, it would have been found that the court proceeded to make this statement plain by the use of this language:

> That is to say, if the donation act of 1850 was applicable to the lands, his right to a patent became

> perfect when the certificate of the surveyor and accompanying proof showed, in the judgment of the Commissioner, a compliance with its requirements. *That they were satisfactory to his judgment in this respect follows from the subsequent issuance by him of the patent.*

It seems impossible to distinguish this case in such a manner as to prevent the application of the principle announced in the case of *Barden* v. *N. P. R. R.* (154 U. S., 288), cited and quoted from at length in briefs of both the original parties to this case.

If it be conceded that the act of Congress, the selection, and the survey vested in the heirs of Baca only an equitable title, as was held in the case of *Carter* v. *Ruddy* (*supra*), then this case is much stronger than the Barden Case, and calls much more plainly for the application of the principle invoked there, while if it shall be held that the act operated as a grant *in praesenti*, this case is still clearly within the rule there decided.

In this action of ejectment it hardly seems necessary to reply to the appeal to the equity side of this court with which the brief for plaintiff in error concludes. It is well understood that this is strictly a legal action; that when the Baca heirs accepted the grant of 1860, with the reservations, they took the same *cum onere*, and that they must bear the burden of the reservation unless that incumbrance has been removed.

It may not be out of place, however, to call attention to the fact that this was an exchange of property, acre for acre; that the right of Baca to his original grant was subject to this same burden or reservation, and that under

the terms of his original grant there were no means by which the incumbrance or reservation could be removed, and that had he taken his original grant *in place*, and had there been no change of sovereignty, all minerals were *perpetually* reserved to the Government. (Rockwell's Spanish and Mexican Law, p. 49, secs. 1, 2, and 3; ibid., p. 112; 113, and 114.)

This, of course, was a matter for consideration of Congress, and but brings us back to the true rule in the case, that plaintiff must recover upon the act of that body and steps taken under it.

A fair résumé of these proceedings, in so far as they have not been formally disapproved, is as follows:

Congress in 1860 gave to the heirs of Baca a right to select certain vacant lands not mineral.

In 1863 these heirs exercised their right of selection.

In same year the claimants caused a private survey to be made of the lands selected.

In 1864 the surveyor-general was authorized to approve such private survey upon condition that he should include in his certificate the reservations included in the act. In the same year, in compliance with this authority, he does approve this survey, and in his certificate recites that the approval "is subject to the conditions and provisions of section 6 of the act of Congress approved June 21, 1860."

In other words, Congress did not intend to grant mineral land and did not grant it; the Commissioner did not intend that any mineral land should pass by any act of his Department, nor did it pass; the surveyor-general,

by his certificate of approval, expressly reserved mineral lands, and yet, in face of the expressed intention of Congress and of every officer of the Government who ever had anything to do with this grant, it is claimed that land, admitted and known to be mineral for more than twenty years, passed by the grant.

We respectfully submit that the judgment of the circuit court should be affirmed.

JOHN K. RICHARDS,
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L. F. PARKER,
Of Counsel for the United States.

SHAW *v.* KELLOGG.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 154. Submitted February 23, 1898. — Decided May 2, 1898.

In 1860 Congress granted a quantity of land in New Mexico, in fulfilment of a grant of non-mineral lands made by Mexico before its transfer, the land to be selected by the grantees, and the surveyor general to survey and locate the land selected, and thus determine whether it was such as the grantees might select. The grantees made their selection, and after considerable correspondence as to the forms of the application and as to the evidence that the selected lands were not mineral lands, the surveyor general, under the direction of the Land Department, approved the selection, and made the survey and location. The Land Department approved the survey, field notes and plat, and the parties were notified thereof, but no patent was issued, as Congress had not provided for such issue. The Land Department noted on its maps that this tract had been segregated from the public domain, and had become private property, and so reported to Congress, and that body never questioned the validity of its action. The grantees entered into possession, fenced the tract, and paid all taxes assessed upon it as private property by the State. *Held*, that the action taken by the Land Department was a finality, and that the title passed, all having been done which was prescribed by the statute.

Such approval entered upon the plat in the Land Department by the surveyor general, under the directions of that department, was in terms "subject to the conditions and provisions of section 6 of the act of Congress, approved June 21, 1860." *Held*, that such limitation was beyond the power of executive officers to impose.

Statement of the Case.

THIS was an action of ejectment brought in the Circuit Court of the United States for the District of Colorado on July 3, 1893, to recover possession of a certain tract in Saguache County, in the State of Colorado, described as follows:

"Section twenty-two (22), township one (1) north, one (1) east, according to the plat of said Baca Grant No. 4, as filed and recorded in the office of the county clerk and recorder of said Saguache County, and including in said section twenty-two certain mineral bearing property designated by the defendant as the Eastern Star Mine, with other mining lands adjacent thereto within said section twenty-two."

After answer a trial was had before a jury, which resulted in a verdict under instructions of the judge for defendant. Upon this verdict judgment was entered, May 22, 1895. Thereupon the plaintiff sued out a writ of error from the Circuit Court of Appeals for the Eighth Circuit. On March 30, 1896, that court certified certain questions. Upon an examination of those questions and after argument of counsel, this court, on December 22, 1897, ordered a certiorari to bring up the entire record, and upon such entire record the case was submitted for consideration.

The premises in question are within the limits of the so called Baca Grant No. 4. The plaintiff is the owner of that grant, and the question presented is as to the validity and extent of his title. Prior to the treaty of Guadalupe Hidalgo between Mexico and the United States of date February 2, 1848, by which New Mexico and other territory in the southwest was ceded to this Government, Mexico had made some quite extensive grants of tracts of land within the territory ceded. Since then Congress has provided for the several portions of the ceded territory different modes of determining the validity and extent of those grants. By the act of July 22, 1854, c. 103, 10 Stat. 308, the office of surveyor general for the Territory of New Mexico was created, and, by section 8, it was made his duty to examine into all claims for lands within the limits of that Territory and to make full report thereof to Congress. In pursuance of this authority the surveyor general examined and reported upon various claims, and

on June 21, 1860, Congress passed an act, c. 167, 12 Stat. 71, confirming several of them. There were two opposing claimants for a large tract of land in the vicinity of the town of Las Vegas. In settling the dispute between them Congress enacted, in section 6:

"SEC. 6. *And be it further enacted*, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Begas [Vegas], to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: *Provided, however*, that the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer."

On July 26, 1860, a letter of instructions was issued by the Land Department to the surveyor general of New Mexico in reference to these private land claims. In that letter, after directing a survey of the Las Vegas grant, and a determination of the area thereof, the instructions were as follows:

"The exact area of the Las Vegas town tract having been thus ascertained, the right will accrue to the Baca claimants to select a quantity equal to the area of the town tract elsewhere in New Mexico of vacant land, not mineral, in square bodies not exceeding five in number.

"You will furnish them with a certificate, transmitting at the same time a duplicate to this office, of their right and the area they are to select in five square parcels. Should they select in square forms according to the existing line of the public surveys, the matter may be properly disposed of by their application duly endorsed and signed with your certificate designating the parts selected by legal divisions or subdivisions, and so selected as to form five separate bodies in square form. Then the certificate thus endorsed is to be noted on the records of the register and receiver at Santa Fé, and sent on here by those officers for approval. Should the Baca

claimants select outside of the existing surveys, they must give such distinct descriptions and connection with natural objects in their applications to be filed in your office, as will enable the deputy surveyor when he may reach the vicinity of such selections in the regular progress of the surveys, to have the selections adjusted as near as may be to the lines of the public surveys, which may hereafter be established in the region of those selections.

"In either case the final condition of the certificate to this office, must be accompanied by a statement from yourself and register and receiver that the land is vacant and not mineral."

The survey made of the grant to the town of Las Vegas showed an acreage of 496,446.96 acres, a certificate of which fact was given to the heirs of said Baca.

On December 12, 1862, the following selection was filed with the surveyor general of New Mexico:

"SANTA FÉ, NEW MEXICO, *Dec.* 12, 1862.

"To Surveyor General JOHN A. CLARK, surveyor general of New Mexico:

"I, John S. Watts, attorney of the heirs of Luis Maria Baca, have this day selected, as one of the five locations belonging to the said heirs under the sixth section of the act of Congress approved June 21, 1860, a tract of land in the Territory of New Mexico, described as follows:

"Beginning at a point on the eastern edge of the valley of San Luis, where the thirty-eighth parallel of north latitude crosses the base of the snowy range, dividing the waters of the rivers Arkansas and Del Norte; thence east along said parallel, four and one half miles; thence south along a meridian line twelve miles, thirty-six (chains) and forty-four links distance; thence west at a right angle twelve miles, thirty-six chains and forty-four links distance; thence north to the said specified parallel of latitude; thence east with said parallel to the place of beginning.

"I further state that the said land is entirely vacant, not claimed by any one, is not mineral, but located for purposes

of arable and pastoral agriculture, and is within the limits of the Territory of New Mexico as established in the organic act. I hereby accordingly make application for the survey and location of the tract of land in accordance with the provisions of the above act of Congress.

"JOHN S. WATTS,
"*Attorney for Heirs of Luis Maria Baca.*"

Prior to this time the Territory of Colorado had been organized and a portion of the Territory of New Mexico included within its boundaries, and the land described in this application was within the territory thus included in Colorado. The surveyor general of New Mexico, on the receipt of this application, forwarded it to the Land Department at Washington, and also transmitted a copy to the surveyor general of Colorado. The surveyor general of Colorado, writing on February 24, 1863, to the Land Department, informed it of the receipt of the copy above referred to, and at the close of his letter made this statement:

"I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca 'floats,' and should locate it as this is located, for the reason that, in his opinion, it would cover rich minerals in the mountains."

In reply the Land Department, on March 13, 1863, wrote as follows:

"It is necessary before the application can be approved by this office, that it be accompanied by the certificates of the surveyor general and the register and receiver that the land selected *is vacant and not mineral*. This is in accordance with our instructions to the surveyor general of New Mexico, extracts from which were furnished your office in our communication of June 7, 1862; especially should the character of the location as to minerals be carefully ascertained after the important statement of ex-Governor Gilpin, which you communicated in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable

you to do so, you will transmit to this office your official certificate setting forth these facts.

"You will also correspond with the register and receiver of Colorado, when they enter upon their official duties, communicating to them the substance of this communication, and call upon them to furnish their certificate, when able, under the same conditions that your own is to be furnished under, which when received you will forward to this office."

During the year 1863 ex-Governor Gilpin, who had become the owner, or at least interested in this location, made application to the surveyor general of Colorado for a survey of the tract. As the land was beyond the limits of the public surveys then completed, the surveyor general made a contract with deputy surveyor A. Z. Sheldon for its survey, and forwarded the same to the Land Department for approval. On November 2, 1863, that office wrote to the surveyor general disapproving of the contract, and adding:

"In your letter dated the 10th March last transmitting the application of the attorney of said heirs for the location of this claim, you say, 'I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca floats, and should locate it as this is located, for the reason that, in his opinion *it would cover rich minerals* in the mountains.'

"Upon the receipt of your letter you were expressly informed, under date of the 13th March, 1863, that before the application could be approved it must be accompanied by the certificates of the surveyor general and the register and receiver that the land is *vacant and not mineral*, and I then took occasion to communicate the following explicit instructions: 'Especially should the character of the locations as to minerals be carefully ascertained after the important statement of ex-Governor Gilpin, which you communicated in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in the selection are vacant and not mineral, to enable you to do so, you will transmit to this office your official certificate setting forth these facts.'

"In our communication of the 7th June, 1862, you were also furnished with extracts from our instructions to the surveyor general of New Mexico, referring to the location of these claims, in which it was plainly indicated that should selections be made outside of the existing surveys, the survey thereof must be postponed until the vicinity is reached by the regular progress of the public surveys. You will be guided in your official acts by our instructions, which are full and explicit, in relation to the location of the claims referred to. The contract and instructions for the survey of the above mentioned claim are herewith returned."

On December 12 the surveyor general wrote to the Land Office a letter containing this statement:

"Sir: I have the honor to acknowledge the receipt of your letter of the 2d of November last disapproving of the contract for the survey of Grant No. 4 of the floats belonging to the heirs of Luis Maria Baca.

"I herewith transmit my certificate that the lands are 'not mineral and are vacant.' You refer to a letter of the former surveyor general of this district, in which he says that he supposes that this location was made by Mr. Gilpin 'for the reason that in his opinion it would cover rich mineral lands.' I do not believe that at the time Mr. Case wrote that letter he had the least idea that the float as located covered any mineral lands. I have signed the accompanying certificate partly from my own knowledge of the country, but mostly for the following reasons:

"1st. The discoveries of gold thus far go to show that the gold lands of Colorado commence at the base of Long's Peak and extend in a course about 30° west of south to the headwaters of the San Juan, covering a belt of country about 30 miles in width of which the line indicated will be near the western boundary; outside of this no gold or silver lodes have been discovered.

"2d. The grant is located on the great line of travel between Denver and Santa Fé, and thousands of experienced miners have been travelling over the Sangre de Christo and Mosca passes and have found no gold or other valuable minerals.

"3d. In the summer of 1860 a party of one hundred and fifty miners from here under one Roeder went to the San Luis valley and prospected the whole of the Sangre de Christo range, but found no gold anywhere on the eastern run of the park. Many of the men who were in this expedition have been in my employ, and from them I have had this history of the expedition.

"Such are the grounds on which I have signed the certificate, and to me they are satisfactory."

He enclosed in it certificates of himself and the register and receiver of the local land office in the following language:

"DENVER, C. T., *December* 5, 1863.

"SIR: This is to certify that from good and sufficient evidence I am perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their Grant No. 4, in the San Luis valley, and marked out by a survey made by Albinus Z. Sheldon in November, 1863, is not mineral and is vacant.

"Very truly, your ob't servant, JOHN PIERCE,

"*Surveyor General of Colorado and Utah.*"

"COLORADO TERRITORY, GOLDEN CITY, *December* 5, 1863.

"SIR: This is to certify that from good and sufficient evidence we are perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their Grant No. 4, in the San Luis valley, and marked out by a survey made by Albinus Z. Sheldon in November, 1863, is not mineral and is vacant.

G. N. CHILCOTT,

"*Register Land Office, Colo. Dist.*

"C. B. CLEMENTS,

"*Receiver Land Office, Colo. Ty.*"

To this letter the Land Office replied on January 16, 1864, stating —

"The evidence furnished by you is not sufficient in the opinion of this office, to prove that the selection No. 4 does not cover valuable mineral deposits. Your certificate is not based upon actual knowledge of the facts, but upon the infor-

mation and conclusions deduced from reasoning. This kind of proof is not deemed sufficient when large public interests may be involved, and the character of the location is made still more doubtful by the statement of ex-Governor Gilpin officially communicated to this office by Surveyor General Case, that there are mineral lands in that locality.

"The statement of the register and receiver required in our instructions is also wanting.

"The approval of the selection will stand suspended until some satisfactory proof is obtained upon the points indicated."

On February 12, 1864, the Land Office again wrote to the surveyor general the following letter:

"JOHN PIERCE, Esq., surveyor general, Denver City, Colo.

"Sir: I have considered your report of the 14th December last, respecting the survey made in November, 1863, by Deputy Surveyor Albinus Z. Sheldon, of what is known as the Luis Maria Baca float, in San Luis Park, in Colorado, and containing 92,293 acres.

"You transmit your certificate 'that the lands are not mineral and are vacant,' and state under specific heads 'the grounds on which' you 'have signed the certificate' and which are satisfactory to you. You report further that 'the survey as made by Mr. Sheldon is probably as near perfect as can be made, as the mountains at the northeast corner of the grant are inaccessible at any time of the year.'

"The act of Congress approved 21st June, 1860, U. S. Statutes at Large, vol. 12, page 71, chap. 167, confers authority for the location of the said Baca float in the then Territory of New Mexico, but now a part of Colorado Territory.

"The said statute makes it the 'duty of the surveyor general of New Mexico,' now in your jurisdiction, 'to make survey and location of the lands so selected by the heirs of Baca when thereunto required by them,' with a proviso making a three years' limitation to the statute.

"You further report that you have refunded to Mr. Gilpin the money placed in your 'hands and he has paid for the survey as a private survey, though he has permitted' you 'to

make an abstract of the field notes which ' you ' have placed on file in ' the surveyor general's office.

"This part of the proceedings is irregular. Under statutory requirements it is obligatory upon private claimants to pay for the survey of confirmed private claims, but the work must be done under the usual obligations and responsibilities both of deputies and surveyor general.

"The difficulty, however, may be avoided by pursuing the following course: The original field notes, duly verified and authenticated, must be filed in the surveyor general's office of Colorado; upon bringing these to the usual satisfactory tests, and finding the same all regular and correct you are authorized in virtue of the aforesaid sixth section of the said act of 21st June, 1860, to approve the said survey, but in your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land nor to interfere with any other vested rights if such exist.

"The statute does not order the issue of a patent. The aforesaid law of 21st June, 1860, with your plat approved in the manner indicated, will therefore constitute the evidence of title.

"You will take care so to arrange the matter that hereafter when in the gradual progress of the lines of the public surveys they shall reach the Baca location they shall be properly connected therewith and so appear on the township plats."

And again, on February 26, 1864, the Land Office sent the following to the surveyor general:

"Sir: At the request of William Gilpin, Esq., I herewith transmit the following papers, to wit:

"First. Mr. Gilpin's application for the survey of Grant No. 4 of the heirs of Baca, dated October 3, 1863.

"Second. Surveyor general's estimate of the cost of said survey, dated October 5, 1863.

"Third. Surveyor general's receipt for $600, deposited by Mr. Gilpin to pay for the above survey, October 6, 1863.

"Fourth. Certificate of the register and receiver at Golden City, Colorado, that the lands covered by the said Grant No. 4 are not mineral and are vacant, December 5, 1863.

"Fifth. The field notes of the boundary lines of the above grant, together with plat thereof.

"These papers were deposited in this office by Mr. Gilpin and are transmitted to you for such action as you shall deem proper in the premises in accordance with the views expressed in our communication to you, dated the 12th instant."

Thereupon the field notes of the survey with the certificate of the surveyor and his assistants were duly filed in the surveyor general's office and approved by him, his certificate of approval being in these words:

"The foregoing field notes of the survey of Grant No. 4, heirs of Luis Maria Baca, executed by Albinus Z. Sheldon, under his contract of the 7th day of October, 1863, having been critically examined, the necessary corrections and explanations made, the said field notes and the survey they describe are hereby approved."

In the general description accompanying the field notes is this statement by the deputy surveyor:

"This grant contains every grade of land from the most productive to the most sterile. La 'Trois Tetons' and the Chatillon Creeks have each rich bottom lands, from one half of a mile to a mile in width, extending nearly to the mountains. About six miles from the mountains the bottoms rapidly widen until along the west boundary they become almost an unbroken savannah, thickly covered with grass, red-top and other varieties, some of which is five feet in height.

"The grant contains about forty thousand (40,000) acres which may be classed as first rate. The balance, excepting the sand hills in the southeast corner (about six square miles) and the extreme mountain portion (say ten square miles) is good grazing land; and between the Chatillon and Arenas Creeks affords a rich growth of gramma grass.

"The Chatillon leaves the mountains at a point nearly equidistant between the north and south boundary lines, and runs in a due westerly direction until it is lost in the savannah above mentioned. These creeks are timbered about five miles. There is considerable good pine near the base of the mountains and firs higher up. Along the streams are cottonwoods

(sweet cottonwoods) of considerable size. There is no stone except in the vicinity of the mountains. These are composed mainly of a dense and fine grained granite varying to sienite and gneiss. Near their base is found a very compact conglomerate, parti-colored, and presenting more than the beauties of the mosaic art. Saw fragments of limestone (jurassic) but none in position. Saw no indications of the precious metals or minerals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle set forth in the notes."

The map of the survey was also filed and approved by the surveyor general. A copy of the map, with the certificate of approval, is on page 324.

On March 29, 1864, the surveyor general forwarded to the Land Office a transcript of the field notes and plat of the survey with his approval entered thereon, the receipt whereof was acknowledged by the Land Office in a letter of date May 4, 1864, which letter is as follows:

"JOHN PIERCE, Esq., surveyor general, Denver City, C. T.

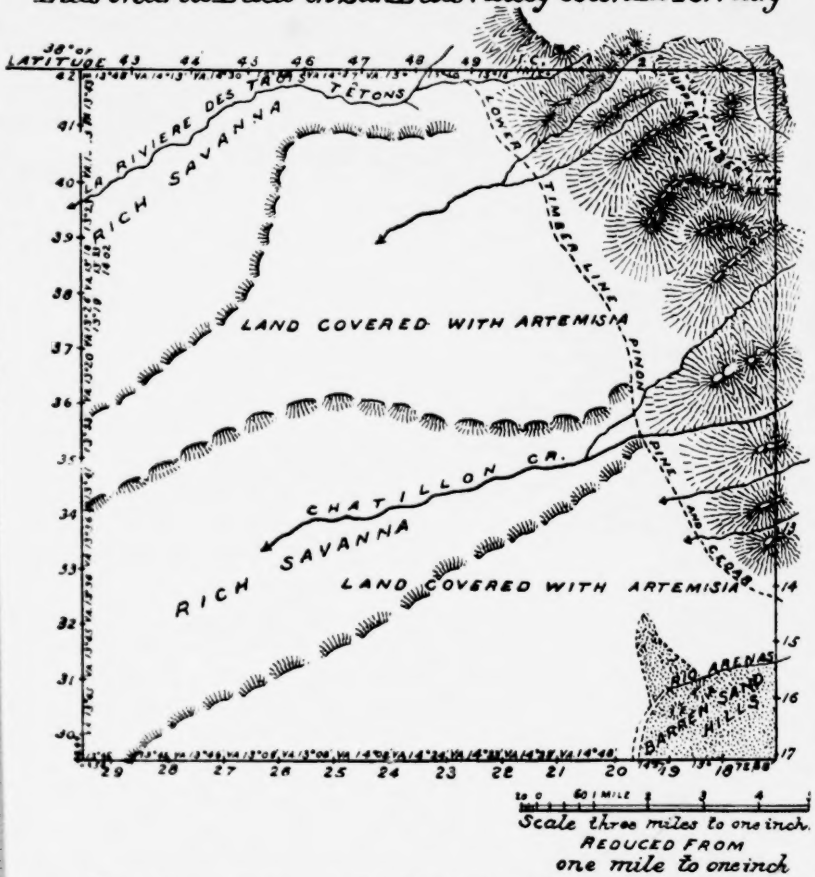
"SIR: Your letter of March 29 last, transmitting transcript and field notes of the survey of Grant No. 4, of the heirs of Luis Maria Baca, has been received at this office."

These were all the proceedings had at the time in reference to the location, survey and transfer of title of this grant.

Subsequently, and on January 14, 1868, application was made for a patent, and declined by the Land Office in these words:

"SIR: Referring to your application of 12th inst. for the issuing of patent for the tract of land in Colorado known as 'Baca Tract No. 4,' I have to state that the selection authorized by the sixth section of the act of 21st June, 1860, (Stats. vol. 12, page 72,) has been made, and the survey executed and reported to this office, but as no provision is made in the statute for the issuing of patent, the survey and statute are the only authorized evidences of title, this office having no authority to issue patents unless the statute expressly orders the same, which is not done in the Baca case, but 'that a grant may be made by a law as well as a patent pursuant to a law is undoubted (6 Cr. 128); a confirmation by a law is as

MAP OF THE **SURVEY** OF **GRANT N°4** OF THE HEIRS OF
Luis Maria Baca in San Luis Valley Colorado Territory



The above map of the boundary lines of Grant No. 4 of the heirs of Luis Maria Baca in San Luis Valley Colorado Territory, as surveyed by Albinus Z. Sheldon under his contract bearing date the 7th day of October 1863 is strictly conformable to the field notes on file in this office, which have been examined and approved, subject to the conditions and provisions of Sec. 6 of the act of Congress approved June 21st 1860.

Surveyor Generals Office JOHN PIERCE
Denver March 18th 1864 Sur. Genl. Colo. & Utah

fully to all intents and purposes a grant, as if it contained in terms a grant *de novo*.'"

Again, in March, 1879, a further application was made through the surveyor general of Colorado for a patent. This application was denied, and the Commissioner of the General Land Office, in his letter declining to issue a patent, after reciting the history of the grant, stated:

"After the selection, but previous to the location, the Commissioner of the General Land Office instructed the surveyor general of Colorado that, as the statute did not authorize the issuing of a patent, the act of June 21, 1860, and the plat approved by the surveyor general would constitute the evidence of title.

"There is no doubt that the Government may convey and vest the legal title without issuing a patent as effectually as may be done by patent. (*Larriviere* v. *Madegan*, 1 Dillon, 455; *Grignon* v. *Astor*, 2 Howard, 319; 3 Opinions of Att'y Gen. 350.)

"The surveyor general was authorized by the act to locate only vacant non mineral land. Unless the contrary appeared it would be presumed from the act of locating that the surveyor general determined the land was not mineral. But before locating, the surveyor general had expressly found and certified that this land was not mineral.

"It is now alleged that the land is mineral; that the surveyor general approved the plat of survey 'subject to the conditions and provisions of section six of the act of Congress, approved June 21, 1860,' and that, therefore, the grantees cannot hold the land under that act.

"The conditions and provisions of the act of June 21, 1860, were as respects this question, that the selection and location should be on land determined at the time of such location, when the title passed, to be non mineral land.

"The act did not intend that if at any subsequent time in the remote future, mineral should be discovered, the title should be unsettled, or that the title should be the subject of controversy through all time, as often as any one might choose to allege its mineral character.

"The surveyor general did not undertake, and had no power, to impose conditions not in the act.

"If after fifteen years the question as to the mineral character of the land may be reopened, why may it not be raised again after the lapse of any number of years? If the question may be reopened as to the land granted under the provisions of the act of June 21, 1860, why may it not as to land acquired under the homestead, preëmption and other acts of Congress? Would such titles ever be considered secure?

"The question as to the mineral or non mineral character of this land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals; this office has no authority to reopen the question; the land cannot longer be regarded as a part of the public domain.

"Mr. Gilpin, who claims this tract of land as the assignee of the Baca heirs, makes personal application for a patent. It is not claimed that the granting act authorized a patent to issue, but that it is authorized by section two of the act approved March 3, 1869 (15 Stat. 342), and by section 2447, Rev. Stat. U. S. But those provisions authorize a patent to issue only when claims to land have been confirmed by law; that is, where an act of Congress recognizes a claim to specific land, and does not apply to cases where the acts of Congress only authorize a claim to be made thereafter to land without regard to any specific tract or parcel of land. This office can issue patents only where it is authorized by some act of Congress. The application of Mr. Gilpin for a patent must therefore be refused."

Subsequently, and on June 28, 1884, in response to inquiries as to whether prospectors would be allowed to hold any mineral discoveries made on said location, the Land Office replied as follows:

"In the case of location No. 4, in question, the surveyor general having first ascertained and determined that the land selected was vacant and non mineral, surveyed and located it, and approved the plat of the location, March 18, 1864, and this approved plat, in the absence of any provision of law for

the issuing of patent, became the evidence of title in the owner of the land so located.

"On a subsequent application by Governor Gilpin for a patent, it was contended, before this office, that mineral existed in some part of the location, and therefore the grantee could not hold the land under the act. The matter was fully considered and the following conclusions reached:

"The conditions and provisions of the act of June 21, 1860, were, as respects this question, that the selection and location should be on land determined, at the time of such location, when title passed, to be non mineral.

"The act did not intend that if at any subsequent time, in the remote future, mineral should be discovered, the title should be unsettled, or that the title should be the subject of controversy through all time, as often as one might choose to allege its mineral character.

"The surveyor general did not undertake, and had no power to impose conditions not in the act.

"The question as to the mineral or non mineral character of the land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals, and this office has no authority to reopen the question; the land can no longer be regarded as a part of the public domain.

"You will see by the foregoing that the land in question was determined, in 1864, by the surveyor general, whose province and duty it was, to be non mineral; the location was then perfected and the title passed. Whether prospectors will be allowed to hold any mineral discoveries thereon, prior to or since 1880, must probably rest between them and the holders of the location No. 4."

And again, on June 8, 1889, in response to a similar application the acting commissioner replied as follows:

"In determining the various questions involved in the case, this office on March 21, 1879, decided that the character of the land involved had already been determined, and the matter, therefore, was *res adjudicata*.

"The question as to the mineral or non mineral character

of this land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals. This office has no authority to reopen the question. The land can no longer be regarded as a part of the public domain, etc.

"The case has, therefore, become final so far as this office is concerned."

In the annual report of the surveyor general of Colorado of the proceedings of his office, dated October 1, 1864, which was transmitted to Congress in the report of the Secretary of the Interior for 1864, it is stated:

"During the month of November, 1863, deputy surveyor A. Z. Sheldon made a survey of Grant No. 4 of the heirs of Luis Maria Baca, as located by William Gilpin, attorney for said heirs, under the act of June 21, 1860. The survey was made under the usual guarantee of its accuracy, and the field notes returned to this office for approval. Under instructions from the General Land Office dated February 12, 1864, that survey and location were approved, subject to the conditions and restrictions above referred to."

And in the report of the Commissioner of the General Land Office of the same year, and included in the same report to Congress, it is also stated:

"In Colorado Territory the returns of surveys for the last fiscal year consist of correction, parallel, township and sectional lines, with fifty miles of private grant embracing over 431,000 acres of public lands. Also 92,292 acres in the fourth location of the Las Vegas grant, as confirmed by the act of 21st June, 1860, to the heirs of Luis Maria Baca, the premises formerly falling within the limits of New Mexico, but now of Colorado."

In the same volume is found a map accompanying the report of the Secretary of the Interior, which shows Baca Grant No. 4 segregated from the public domain, and it was admitted by counsel that all government maps issued from that time to this make a similar showing of the segregation of this tract.

The plaintiff and those under whom he claims have been in continuous and actual possession of this Baca Grant No. 4 since

at least 1869; in 1881 a fence was built entirely around the tract except for a little distance in the northeast corner, where the precipitous character of the mountains created a natural fence, and from that date onward to the present time it has remained under enclosure; and the plaintiff and his grantors have paid the annual taxes levied thereon by the State of Colorado, amounting, since the year 1877, to $66,000.

In 1876 François Herard and two associates discovered a mineral vein, which they named the "Eastern Star," and on June 16 of that year filed a certificate of location in the proper office; but in 1877, upon ascertaining that this mineral location was within the limits of the Baca grant, they abandoned the mine. In 1879 the owners of the grant leased this mine to one William Young, but he immediately thereafter threw up the lease. In 1883 the mine was again leased to the Gold Legion Mining and Milling Company, but this company soon abandoned the lease. In 1887 the defendant took a verbal lease from the manager of the grant for three months, at the expiration of which time he sought a renewal of the lease, but was refused. Subsequently to this refusal he took possession of the property, and has remained in such possession ever since. And it is this mine, with the adjacent ground, the possession of which was sought to be recovered by this action.

Mr. Edward O. Wolcott and *Mr. Joel F. Vaile* for plaintiff in error.

Mr. John R. Smith for defendant in error.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

In 1860, in settlement of a claim under a Mexican grant to land in the vicinity of Las Vegas, Congress passed an act giving to the claimants an equal amount of land, to be by them selected elsewhere in the Territory of New Mexico, stipulating that the land should be vacant and non-mineral and should be located within three years in square bodies not exceeding five

in number. Within the three years they selected and located the tract in question as one fifth of the land to which they were thus entitled. They applied to the proper officers of the United States to take such steps as would perfect their title. More than thirty-four years ago the Land Department took its final action. Since then it has continuously treated the tract as private land, and refused to recognize it in any way as part of the public domain; within the same year, 1864, in which it took its final action, it reported the fact thereof to Congress, and that body has never in any way questioned the rightfulness of the action taken. And now at the end of this lapse of time the title is challenged, and challenged upon propositions which, if sustained, establish that the owners have never had, and do not now have, any certain title to a single foot of the land, and this although they have been in undisturbed possession all these years, and have paid taxes to the state authorities amounting to $66,000 at least and probably more.

The party who challenges the title of the plaintiff to the particular portion of the tract in controversy in this suit entered at first into possession of it as a tenant, and when at the termination of his lease he was refused a continuance thereof, took steps to maintain a possession and assert a right adverse to his former landlord. It is undoubtedly true that settled rules of law cannot be ignored because in any particular case their application works apparent harshness. At the same time the result to which the contentions of the defendant lead may well compel a careful examination of them.

These contentions are that Congress granted only non-mineral lands; that this particular tract is mineral land, and therefore by the terms of the act is not within the grant; that no patent has ever been issued, and therefore the legal title has never passed from the Government; that the Land Department never adjudicated that this was non-mineral land, but on the contrary simply approved the location, subject to the conditions and provisions of the act of Congress, thereby leaving the question of title to rest in perpetual abeyance upon possible future discoveries of minerals within the tract.

In examining these contentions it is well to consider first

the act of Congress of June 21, 1860, and the circumstances under which it was passed. For, as said in *Winona & St. Peter Railroad* v. *Barney*, 113 U. S. 618, 625, in reference to legislative grants, "they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together." This act was a final disposition by Congress of certain claims under Mexican grants for lands situate in the Territory of New Mexico. The circumstances and character of these claims had been reported to Congress by the surveyor general of the Territory. Some of them were confirmed as reported and *in toto*, and, as stated in *Tameling* v. *U. S. Freehold & Emigration Co.*, 93 U. S. 644, *Maxwell Land Grant case*, 121 U. S. 325, and other cases, such confirmation operated as a grant *de novo*, and took effect at once as a relinquishment by Congress of all rights of the United States to the premises. Others were confirmed in part and for only fractions of the areas claimed, and as to them, by section 2, it was made "the duty of the surveyor general of New Mexico immediately to proceed to make the surveys and locations authorized and required by the terms of this section." Another claim was not confirmed, but leave was given to the claimant to bring suit, with a proviso that if the suit should not be instituted within two years the claim should be presumed to have been abandoned; and in respect to the claim before us the right of location was to continue in force for three years and no longer. Obviously, the thought was that these claims should not only be finally but speedily disposed of. It was not contemplated that the title should remain unsettled, a mere float for an indefinite time in the future.

As the amount of the Las Vegas claim was large, and as the claimants were required to make their locations "in square bodies, not exceeding five in number," each location would necessarily be of a tract of considerable size: in fact, each one

was nearly 100,000 acres. The tract thus located was as a whole to be non-mineral. No provision was made for indemnity lands in case mineral should be found in any section or quarter section. So that when the location was perfected the title passed to all the lands or to none.

It will also be perceived that Congress did not permit this location to be made anywhere in the public domain, but only within the limits of the Territory of New Mexico. It was not like a military land warrant, subject to location upon any public lands, but only a grant which could be made operative within certain prescribed and comparatively narrow limits — limits not even so broad as those of the territory ceded by Mexico. There were then but few persons living in New Mexico; it contained large areas of arid lands; its surface was broken by a few mountain chains, and crossed by a few streams. It was within the limits of this territory, whose condition and natural resources were but slightly known, that Congress authorized this location. The grant was made in lieu of certain specific lands claimed by the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say "lands then known to contain mineral," for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries. This is in accord with the general rule as to the transfer of title to the public lands of the United States. In cases of homestead, preëmption or townsite entries,

the law excludes mineral lands, but it was never doubted that the title once passed was free from all conditions of subsequent discoveries of mineral. As was said in *Deffeback* v. *Hawke*, 115 U. S. 392, 404, where this matter was considered:

"We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the Government under the preëmption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued." See also *Colorado Coal Co.* v. *United States*, 123 U. S. 307.

How was the character of the land to be determined, and by whom? The surveyor general of New Mexico was directed to make survey and location of the lands selected. Upon that particular officer was cast the specific duty of seeing that the lands selected were such as the Baca heirs were entitled to select. It is not strange that he was the one named; for, in the original act of 1854, which made provision for the examination of these various claims, the duty of such examination was cast upon the same officer, and he was there required "to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico; and, for this purpose, may issue notices, summon witnesses, administer oaths and do and perform all other necessary acts in the premises," and it was upon his report that Congress acted. Further, he was the officer who, by virtue of his duties, was most competent to examine and pass upon the question of the character of the lands selected. We do not mean that Congress thereby created an independent tribunal outside of and apart from the

general Land Department of the Government. On the contrary, the act of 1854 provided that he should act under instructions from the Secretary of the Interior, and so undoubtedly in proceeding to make survey and location as required by section 6 of the act of 1860, he was still subject to the control and direction of the Land Department; but while he was not authorized by this section to act in defiance or independently of the Land Department he was the particular officer charged with the duty of making survey and location, and it was for him to say, in the first instance at least, whether the lands so selected, and by him surveyed and located, were lands vacant and non-mineral. This is in accord with the views of the Land Department, as appears from the official letter of June 28, 1884, written in response to an application for the right to make mineral locations within the tract, in which the Commissioner, after stating what had taken place, added: "You will see by the foregoing that the land in question was determined, in 1864, by the surveyor general, whose province and duty it was, to be non mineral; the location was then perfected and the title passed."

It is also worthy of note that Congress did not consider that there was any great probability of the discovery of mineral wealth in New Mexico. By the act of 1860 it confirmed various claims, amounting to millions of acres; confirmed them absolutely and without any reservation of mines then known or to be thereafter discovered within their limits. And this, although under Spanish if not under Mexican law, all minerals were perpetually reserved from such grants. 1 Rockwell's Spanish and Mexican Law, p. 49, secs. 1, 2 and 3, pp. 112, 113 and 114. It made no appropriation for the exploration of the claims to be thereafter located, and although it required the completion of this location within three years, it made but meagre appropriation for surveys, the appropriation in 1860 for surveying both the public lands and private land claims in New Mexico being only $10,000. Act of June 25, 1860, c. 211, 12 Stat. 104, 108.

It will also be perceived that the surveyor general, as well as the register and receiver of the land office, each certified

that the land was non-mineral. These certificates were their decision to that effect. They were made in accordance with the original instructions sent out by the Land Department in July, 1860, and in this respect they were all that was required by those instructions, which were "in either case [that is, whether the selection is either within or outside the existing surveys] the final condition of the certificate to this office must be accompanied by a statement from yourself and the register and receiver that the land is vacant and not mineral." Thus the proper officer decided that the land was non-mineral, and accompanied the report of the survey and location with all the certificates and statements required by the original instructions from the Land Department.

But it is said that, the attention of the Land Department having been called to the fact that this location was made upon lands supposed to contain minerals, it was not satisfied with the requirements it had originally made; was not content with the certificates demanded of the surveyor general and the register and receiver, and expressly disapproved the evidence in fact furnished thereby, and, also, that while it finally authorized an approval of the survey and location, it directed that the certificate of approval should contain the special reservations named in the statute; that is, that the location should not embrace mineral lands. It is undoubtedly true that the suspicions of the Land Department were aroused by the report that was made as to the supposed character of the land embraced within this location, and that by its letter of January 16, 1864, it held that the evidence furnished as to the character of the land was not sufficient. This letter criticises the certificate of the surveyor general on the ground that, as appeared from an accompanying letter, it was based not solely upon his personal knowledge, but upon "information and conclusions deduced from reasoning." It also notes the fact that the certificate of the register and receiver required by the instructions was wanting. There is a seeming conflict between the statements in this letter and the records of the surveyor general's office. The latter indicate that the certificate of the register and receiver was forwarded with the

certificate of the surveyor general, while the letter of the Commissioner says that the former was lacking. This apparent contradiction may arise from the fact that the certificate of the register and receiver was sent in a different enclosure, or perhaps it was overlooked by the Commissioner of the Land Office. At any rate, it was about that time, at least, sent to the Land Department, for, as appears from the letter of February 26, it was returned by that department to the surveyor general. Obviously the Land Department, after sending the letter of January 16, reconsidered its action. It had received the certificate of the register and receiver, and had before it all the certificates required by the original letter of instructions, and instead of continuing the suspension of an approval for further proof, as indicated by the letter of January 16, it wrote, on February 12, to close the matter up, pointing out how all the difficulties which stood in the way could be removed. This letter notes the fact that by the statute it is made the duty of the surveyor general to make the survey and location. It contains no disapproval of the certificates or evidence furnished; authorizes him to approve the survey, although it directs that to his certificate of approval he "add the special reservation stipulated by the statute, but not to embrace mineral lands." It further notifies him that the statute does not provide for a patent, and that the law with the plat approved by him in the manner indicated will constitute the evidence of title. Thereupon the surveyor general proceeded to approve the survey, his certificate of approval being absolute and unconditional. He also approved the plat, though his certificate of approval to that was made as required by the letter of February 12, "subject to the conditions and provisions of section 6 of the act of Congress approved June 21, 1860." He also forwarded to the Land Department the field notes, the survey and the plat with his certificates of approval attached, and they were received and filed by the department without objection. But one conclusion can be deduced from these proceedings, and that is that the Land Department, perceiving that its original instructions had been strictly complied with; that no money had been appropriated

by Congress for actual exploration of the lands; that no way was open for securing further evidence as to their character: that the time within which any other location could be made had passed; that it was the right of the locators to have the question settled and the title confirmed or rejected, ordered the closing of the matter, the passage of the title, and sought to protect the interests of the Government and guard against any criticism of its action by directing an entry in the certificate of approval that it was made subject to the conditions and provisions of the act of Congress.

In this three things are to be noticed: First, that the surveyor general, the officer specially designated to make the survey and location, the one primarily charged with the duty of determining its character, decided that the land was non-mineral. His certificate to that effect is unqualified. His certificate of approval to the field notes and the survey is the same. So far, therefore, as his action is concerned, there was an adjudication that the land was non-mineral. Second, the Land Department directed that the matter be closed, specified how it should be closed, and received and filed without question the report of the surveyor general's action. Third, the only qualification or limitation is found in the direction of the Land Department, followed by the action of the surveyor general in adding to his certificate of approval of the plat the proviso that it is "subject to the conditions and provisions of section 6 of the act of Congress of June 21, 1860." There was no reservation of the matter for further consideration in the Land Department or by the surveyor general. There was a finality so far as they were concerned.

What is the significance of, and what effect can be given to the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of Congress? We are of opinion that the insertion of any such stipulation and limitation was beyond the power of the Land Department. Its duty was to decide and not to decline to decide; to execute and not to refuse to execute the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred.

It was agent and not principal. Congress had made a grant, authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question — a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time. The general statutes of Congress in respect to homestead, preëmption and townsite locations provide that they shall be made upon lands that are non-mineral, and in approving any such entry and issuing a patent therefor could it be tolerated for a moment that the Land Department might limit the grant and qualify the title by a stipulation that if thereafter mineral should be discovered the title should fail? It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land or else denying it altogether. As said in *Deffeback* v. *Hawke*, *supra*, 406:

"The position that the patent to the plaintiff should have contained a reservation excluding from its operation all buildings and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of Congress. The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed."

Further, it must be noticed that the Land Department has since 1864 again and again decided that the action then taken was final, that the land had been segregated from the public domain and become private property. Thus, so far as the judgment of the executive branch of the government is con-

cerned, the finality of the action taken in passing the title has been settled. But we may go further. As appears by the report of the surveyor general and of the Land Department, transmitted to Congress in 1864, the fact that this land had been finally appropriated to the claim of the Baca heirs was disclosed. Mention of that fact was also made in subsequent reports to that body, and yet from that time to the present Congress has taken no action in the matter, and has thus by its silence confirmed the proceedings of the Land Department.

Defendant relies largely on the decision of this court in *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, in which it was held that lands identified by the filing of the map of definite location as within the scope of the grant made by Congress to that company, although at the time of the filing of such map not known to contain any mineral, did not pass under the grant if before the issue of the patent mineral was discovered. But that case, properly considered, sustains rather the contentions of the plaintiff. It is true there was a division of opinion, but that division was only as to the time at which and the means by which the non-mineral character of the land was settled. The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original act of 1864 making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be "construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States," held that the question of mineral or non-mineral was open to consideration up to the time of issuing a patent. But there was no division of opinion as to the question that when the legal title did pass — and it passed unquestionably by the patent — it passed free from the contingency of future discovery of minerals.

Referring to the contention that if the question of mineral was open for consideration until the issue of a patent there would be great uncertainty in titles, the court said (pp. 326-7):

"We do not think that any apprehension of disturbance in titles from the views we assert need arise. The law places

under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims to them under the legislation of Congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized."

It quoted these words from the opinion in *Smelting Company* v. *Kemp*, 104 U. S. 636, 640:

"The execution and record of the patent are the final acts of the officers of the Government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the Government to which the alienation of the public lands, under the law, is entrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law."

And added (329–330):

"There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural, as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive.

* * * * *

"It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly, by officers of the Government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the Government until by further legislation a stricter regard to their duties in that respect can be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the Government to the grantees, reposes in officers of the Land Department."

But, it is said, no patent was issued in this case, and therefore the holding in the *Barden case*, that the issue of a patent puts an end to all question, does not apply here. But the significance of a patent is that it is evidence of the transfer of the legal title. There is no magic in the word "patent," or in the instrument which the word defines. By it the legal title passes, and when by whatsoever instrument and in whatsoever manner that is accomplished, the same result follows as though a formal patent were issued. *Rutherford* v. *Greene*, 2 Wheat. 196, 206; *Bryan* v. *Forsyth*, 19 How. 334; *Langdeau* v. *Hanes*, 21 Wall. 521, 531, in which this court said: "If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the lands segregated." The land passes out of the jurisdiction of the Land Department. The grant has then become complete, and the only remedy for any wrong in the transfer of such title is through the courts, and not in the Land Department. *Michigan Land & Lumber Company* v. *Rust*, 168 U. S. 589, 592, and cases cited in the opinion. In this case the Land Department refused to issue a patent; decided that it had no power to do so, and that the title was complete without one. It would seem strange to hold that the lack of a patent left the question of mineral an open one when there was no authority for the issue of a patent, when it was in fact refused and when the

title passed the same as though a patent had issued. There was not at the time of these transactions, and has not since been, any statute specifically authorizing a patent for this land. Sec. 2447, Rev. Stat. taken from the act of December 22, 1854, c. 10, 10 Stat. 599, applies only to the case of a claim to land "which has heretofore been confirmed by law." And the same may be said as to the special act of March 3, 1869, c. 152, 15 Stat. 342. Here there had been no claim confirmed to any tract of land, but only the grant of a right to locate. In that respect it was like a land warrant, subject to location anywhere within the specified territory. As to land warrants, however, there is a specific provision for the issue of patents. Rev. Stat. § 2423. The Land Department was, therefore, technically right when it said that the statute did not order the issue of a patent, and that the case was one in which the granting act with the approved survey and location made a full transfer of title. Very likely if a patent had been issued the courts would not have declared it void, but have sustained it as the customary instrument used by government to make a transfer of the legal title. *Carter* v. *Ruddy*, 166 U. S. 493. But as there was no statute in terms authorizing a patent, it was not within the power of the locators to compel the issue of one. No court would by mandamus order such issue in the absence of a specific and direct statute requiring it. So when the department refused to issue one the locators had no alternative but to accept that which the statute had provided as the means of acquiring and the evidence of title, and that must be treated as having all the efficacy of a patent.

Summing up the whole matter it results in this: Congress in 1860 made a grant of a certain number of acres, authorized the grantees to select the land within three years anywhere in the Territory of New Mexico, and directed the surveyor general of that territory to make survey and location of the land selected, thus casting upon that officer the primary duty of deciding whether the land selected was such as the grantees might select. They selected this tract. Obeying the statute and the instructions issued by the Land Department, that officer approved the selection and made the survey and loca-

tion. The Land Department, at first suspending action, finally directed him to close up the matter, to approve the field notes, survey and plat, and notified the parties through him that such field notes, survey and plat, together with the act of Congress, should constitute the evidence of title. All was done as directed. Congress made no provision for a patent and the Land Department refused to issue one. All having been done that was prescribed by the statute, the title passed. The Land Department has repeatedly ruled that the action then taken was a finality. It has noted on all maps and in its reports that this tract had been segregated from the public domain and become private property. It made report of this to Congress, and that body has never questioned the validity of its action. The grantees entered into actual possession and fenced the entire tract. They have paid the taxes levied by the State upon it as private property, amounting to at least $66,000. While the approval entered upon the plat by the surveyor general under the direction of the Land Department was in terms "subject to the conditions and provisions of section 6 of the act of Congress, approved June 21, 1860," such limitation was beyond the power of executive officers to impose.

We are of opinion that at this late day the title of the locators and their grantees is not subject to challenge, and that it is a full, absolute and unconditional title.

The judgment of the Circuit Court will, therefore, be reversed and the case remanded for a new trial.